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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

JURISDICTION

This matter is before this Court by reason of an order entered by this Court on November 19, 1973, dismissing the appeal of the petitioners from a decision of the Supreme Court of Washington, reported in 82 Wn.2d 11, 507 P.2d 1169 (1973), but granting their alternative petition for certiorari in accordance with 28 U.S.C § 1257(3).

Prior to granting its writ of certiorari, at the Court's invitation, the parties submitted briefs on the question of mootness. The briefs are attached as Apppendix B. Both parties agreed that the case was not moot but it was stated and has been

understood that regardless of the outcome of this litigation Mr. DeFunis will graduate with his class in June, 1974.

QUESTION PRESENTED

Is race a factor which the Law School of the University of Washington, a state university, may constitutionally take into account, as one element in selecting from among qualified applicants those students who will be accepted for admission, in pursuit of a state policy to mitigate gross under-representation of certain minorities in the Law School and in the membership of the Bar?

Respondents submit that this is the only question which is properly before the court in this case.[1] If it is answered in the negative, and contrary to the position of the respondents, the affirmative action programs of the University of Washington and its Law School, like similar programs at many other state institutions, are at an end.[2]

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1. Petitioners' Question A confusingly describes the Law School's admission program as "giving preference *solely on the basis of race.*" (Their emphasis. Pet. Br. 3.) Minority race is a factor considered, but the Law School has never admitted or enrolled any student "solely on the basis" of any race.

Petitioners' Question B, alleging violation of the Civil Rights Act, has no basis in the record or in fact, and was not an issue in the trial court or in the Washington State Supreme Court. (Pet. Br. p. 3.)

Amici which treat the question in terms of "quotas" either failed to study the record in this case or chose to use this case to argue an issue which this case does not present.

2. Although the trial court expressly held that all claims of the petitioners, other than the equal protection claim, were "without merit" (App. 57), and petitioners do not explicitly raise them here, nor were they raised in the Washington Supreme Court, nevertheless, the decision of the majority of the Supreme Court was attacked in the dissent. There is appended to this brief an identification of the errors in the dissenting

STATEMENT OF THE CASE

The Supreme Court of the State of Washington has adequately stated the facts in the majority opinion written by then Justice Neill.[3] We set them forth here as a part of respondents' Statement of the Case:[4]

"Law school admissions pose a complex problem, and require a sensitive balancing of diverse factors. To gain insight into the complicated process of selecting first-year law students, and to better appreciate the essence of plaintiff's complaint against the law school, we turn first to the circumstances and operative facts—as delineated by the record—from which this litigation arises.

"Under RCW 28B.20.130(3), the Board of Regents of the University of Washington has the power and duty to establish entrance requirements for students seeking admission to the University. The dean and faculty of the law school, pursuant to the authority delegated to them by the Board of Regents and the President of the University, have established a Committee on Admissions and Readmissions to determine who shall be admitted to the law school. For the academic year September 15, 1970, to June 15, 1971, the committee was composed of five faculty members and two student members; on June 7, 1971, the faculty of the law school expanded the membership of the committee to six faculty members and

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opinion of Chief Justice Hale of the Washington Supreme Court. (Appendix A.)

3. The decision was 7 to 2 including the author of the majority opinion who had resigned from the Washington Supreme Court and taken his seat on the United States District Court for the Eastern District of Washington at the time the decision was announced.

4. The footnotes in the following quotation are the Washington Court's footnotes renumbered, except for our bracketed additions.

three student members. The chairman estimated that the committee spent over 1,300 hours in the selection process for the 1971-72 first-year class.

"The number of qualified applicants to the law school has increased dramatically in recent years. In 1967, the law school received 618 applications; in 1968, 704; in 1969, 860; and in 1970, 1026 applications were received. The law school received 1601 applications for admission to the first-year class beginning September, 1971. Under the University's enrollment limitation there were only 445 positions allotted to the law school, and of these the number available for the first-year class was between 145 and 150. The chairman of the admissions committee stated that most of these applicants would be regarded as qualified by admissions standards at this and other comparable law schools in recent years. Hence, the task of selection is difficult, time-consuming and requires the exercise of careful and informed discretion, based on the evidence appearing in the application files. While many applicants are relatively easy to select for admission because of very outstanding qualifications, and others are relatively easy to reject, the middle group of candidates is much more difficult to assess. Plaintiff was in this latter category.

"Applicants for admission to the law school must have earned an undergraduate degree and taken the Law School Admission Test (LSAT) administered by the Educational Testing Service of Princeton, New Jersey. They must also submit with their written application a copy of transcripts from all schools and colleges which they have attended prior to application for admission, together with statements from their undergraduate dean of students and letters of recommendation from faculty members in their major field of study. They

may submit additional letters of recommendation and statements. The application for admission gives the applicant the option to indicate his 'dominant' ethnic origin. The admissions process does not include personal interviews and does not reveal whether applicants are poor or affluent.

"The committee's basic criteria for selecting students are expressed in the 'Guide for Applicants,' a copy of which plaintiff received with his 1971 application:

> 'We below describe the process we applied to determine the class that entered the University of Washington School of Law in September 1970. We anticipate that the same process will be applied in determining membership in the class of 1971.
>
> . . .
>
> 'In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large.' [St. 407, Exh. 45.]

"For the purpose of a preliminary ranking of the applicants for the class of 1974, the junior-senior undergraduate grade point average and the Law School Admissions Test scores[5] for each applicant were combined through a formula to yield a predicted first-year of law school grade average for the applicant. This preliminary index number is called the Predicted First-Year Average (PFYA). The relative weight of grades and test scores in this formula was determined on the basis of past experience at the law school. The same formula is used for all applicants in a given year. If an applicant has taken the LSAT more than once in the past 3 years, the average score

---

5. The Law School Admissions Test yields two scores for each candidate, a general law aptitude score and a writing ability score.

is employed rather than the latest score; this is done to offset a learning effect which statistical studies by the Educational Testing Service indicate occcurs as the result of the multiple taking of the test.

"Plaintiff's PFYA, as determined by the law school, was 76.23. This figure was calculated by using a formula combining plaintiff's junior-senior grade point average of 3.71, average LSAT score of 582 (512 plus 566 plus 668, divided by 3)[6] and average writing test score component of 61 (62 plus 58 plus 64, divided by 3).

"Ranking of applicants by PFYA was used to help organize the committee's processing of the applications. On the basis of the previous year's applicant group, the committee decided that most promising applicants for the class of 1974 would be defined as applicants with predicted first-year law school averages over 77. Applicants with PFYAs above 77 were reviewed and decided by the full committee as they came in, in order to reach an early decision as to the acceptance of such students. Each of these files was assigned to a committee member for thorough review and for presentation to the committee.

"Applicants with PFYAs below 74.5 were reviewed by the chairman of the committee, and were either rejected by him, or placed in a group for later review by the full committee. The decision of rejection or committee review of an application was based on the chairman's judgment derived from information in the applicant's file indicating whether the applicant had a significantly better potential for law study than

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6. Plaintiff took the Law School Admissions test on three different occasions: August 1969, November 1969 and December 1970.

the relatively low predicted first-year average tended to indicate. Cases of doubt were to be resolved in favor of deferring judgment until committee review could be undertaken.

"Two exceptions were made in regard to applicants with PFYAs below 74.5. First, the law school had established a policy that persons who had been previously admitted but who were unable to enter, or forced to withdraw from, the law school because of induction into the military service, had a right to reenroll if they reapplied immediately upon honorable completion of their tour of duty. Second, all files of 'minority' applicants (which the committee defined for this purpose as including Black Americans, Chicano Americans, American Indians and Philippine Americans[7]) were considered by the full committee as warranting their attention, regardless of the PFYA of the individual applicant.

"Applicants with predicted first-year averages between 74.5 and 76.99 were accumulated and held until the applications deadline had passed and essentially all the applications were complete and ready for review, so that the critical decisions as to the remainder of the incoming class could be made with a relatively complete view of qualified applicants not therebefore admitted. Plaintiff's application, presenting a 76.23 predicted first-year average, was placed in this third category. Included for consideration at that time, in addition to the minority group and those with PFYAs between 74.5 and 77,

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7. The chairman of the admissions committee testified that Asian-Americans, *e.g.*, were not treated as "minority" applicants for admissions purposes, since a significant number could be admitted on the same basis as general applicants. [See further discussion of this matter, *infra* p. 44.]

As used herein, the term "minority" refers to and includes only Black Americans, Chicano Americans, American Indians and Philippine Americans.

were some applicants with PFYAs above 77 upon whom the committee had reserved judgment, feeling that such applicants were not as promising as their PFYAs seemed to indicate.

"These 'close cases,'—*i.e.*, where the applicant was neither clearly outstanding nor clearly deficient—required the most effort of the committee. In selecting the applicants from this narrow range, the committee used the process described in its Guide for Applicants, a copy of which was sent to all applicants:

> 'We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.
>
> 'An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.
>
> 'We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.' [St. 407, Exh. 45.]

"Each file to be reviewed by the full committee was first assigned and read by a committee member who reported on its contents to the committee. There followed a discussion on the applicants under consideration, leading to a committee vote on the disposition of the application. Assignment of files

to the committee member for initial reading was usually on a random basis. The files of Black applicants, however, were assigned to and separately read by both Professor Geoffrey Crooks and Mr. Vincent Hayes, the two committee members thought best equipped to report to the full committee on the contents of the file. Professor Crooks worked with minority applications during the summer of 1970 as director of the school's Council on Legal Education Opportunities (CLEO) program[8] and Mr. Hayes, a second-year Black law student, who previously served as director of the Governor's Multi-Service Center in Seattle, a job involving considerable personnel evaluation. Applications of Chicanos, American Indians and Filipinos were reviewed by Associate Dean Robert S. Hunt for presentation to the committee.

"In considering minority applicants, the committee was guided by a University-wide policy which sought to eliminate the continued effects of past segregation and discrimination against Blacks, Chicanos, American Indians and other disadvantaged racial and ethnic minority groups. At trial, the President of the University of Washington testified as to the origin of this policy:

> 'More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or other seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the schools, but obviously, also, by the colleges in the University and the University of

8. A federally (OEO) funded program, sponsored by the American Bar Association, the American Association of Law Schools, the National Bar Association and the Law School Admission Council, which provides summer training programs and financial assistance to disadvantaged college students seeking admission to law school.

Washington, in particular, given the racial distribution of this state.

. . .

'So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.' [A fuller text of President Odegaard's testimony is set forth at pp. 39-40 *infra*, n.26.]

"Thus, the University sought to achieve a reasonable representation within the student body of persons from those groups which have been historically suppressed by encouraging their enrollment within the various programs offered at the University. Policies for admission of minorities throughout the University recognized that the conventional 'mechanical' credentializing system does not always produce good indicators of the full potential of such culturally separated or deprived individuals, and that to rely solely on such formal credentials could well result in unfairly denying to qualified minority persons the chance to pursue the educational opportunities available at the University.

"The law school sought to carry forward this University policy in its admission program, not only to obtain a reasonable representation from minorities within its classes, but to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system. In doing so, the Admissions Committee followed certain procedures which are the crux of plaintiff's claimed denial of equal protection of the laws.

"First, in reviewing the files of minority applicants, the com-

mittee attached less weight to the PFYA in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school. Also, the chairman testified that although the same standard was applied to all applicants (*i.e.*, the relative probability of the individual succeeding in law school), minority applicants were directly compared to one another, but were not compared to applicants outside of the minority group. The committee sought to identify, within the minority category, those persons who had the highest probability of succeeding in law school. Thus, the law school included within its admitted group minority applicants whose PFYAs were lower than those of some other applicants, but whose entire record showed the committee that they were capable of successfully completing the law school program.[9]

"As a result of this process, the committee admitted a group of minority applicants, placed a group of such applicants on a waiting list, and rejected other minority applications. The dean of the law school testified that the law school has no fixed admissions quota for minority students, but that the committee sought a reasonable representation of such groups in the law school. He added that the law school has accepted no unqualified minority applicants, but only those whose records indicated that they were capable of successfully completing the law school program.

"The admissions committee sent letters of acceptance to over 200 applicants. Normal attrition among those invited was expected to reduce this group to produce a class of about 150. Against the possibility of unusually high attrition among the

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9. For example, many of the minority group applicants were first screened through special compensatory summer programs, operated primarily by CLEO. [See text at note 8, *supra*, p. 9.]

group of accepted applicants, the committee placed approximately 155 additional applicants on a waiting list. The waiting list was ranked in approximate quartiles, with 46 applicants in the highest quartile, 38 applicants in the second quartile, 36 applicants in the third quartile, and 33 applicants in the fourth or lowest quartile. The remaining applicants—those receiving neither offers of acceptance nor waiting list assignments—received letters of denial. Plaintiff received an invitation to be placed on the waiting list and he was ranked in the fourth or lowest quartile. On July 21, 1971, the rate of attrition from the admitted applicants appearing to be within normal ranges, the committee decided to send letters of denial to those applicants in the third and fourth quartiles on the waiting list. Plaintiff was thus notified on August 2, 1971, that he was neither admitted nor any longer on the waiting list. As of August 1, 1971, 275 students were admitted to the freshman law school class and 55 students remained on the waiting list, making a total of 330 students.

"Out of the 275 students given notice of admission, 127 were nonresidents of the state of Washington. Out of the 55 on the waiting list, 23 were nonresidents of the state of Washington. Thus, of the 330 applicants admitted or waiting, 180 were residents of the state of Washington. Ultimately, 32 nonresidents (21.6 per cent of the entering class) actually enrolled in the first-year class.

"Because of the judgmental factors in the admissions process, as outlined, the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of these were minority applicants, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitation on the basis of other

information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority group students invited 18 actually enrolled in the first-year class.

"The trial court found that some minority applicants with college grades and LSAT scores so low that had they been of the white race their applications would have been summarily denied, were given invitations for admission; that some such students were admitted instead of plaintiff; that since no more than 150 applicants were to be admitted to the law school, the admission of less qualified students resulted in a denial of places to those better qualified; and that plaintiff had better 'qualifications' than many of the students admitted by the committee. The trial court also found that plaintiff was and is fully qualified and capable of satisfactorily attending the law school.

"The trial court concluded that there is no constitutional restriction upon admitting nonresidential students; and no laws or regulations provide preference to residential students over nonresidential students for admission to the University of Washington School of Law; that, in denying plaintiff admission to the law school, the University of Washington discriminated against him and did not accord him equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution; and therefore, that plaintiff should be admitted to the law school for the class of 1974, beginning September 22, 1971.[10]" *DeFunis v. Odegaard*, 82 Wn.2d at 14-23. (Juris. St. A-5 to A-14.)

10. At time of oral argument in this court it was stated that plaintiff had actually been admitted to the law school in September, 1971, and was still in attendance. Due to the conditions under which plaintiff was admitted and the great public interest in the continuing issues raised by this appeal, we do not consider the case to be moot.

This statement by the Washington Supreme Court needs to be supplemented in only one respect. Of the minority students offered admission, only one black applicant and *no* Chicano, American-Indian, or Filipino applicants had predicted first-year averages higher than the petitioner, though all were qualified. (App. 38, 39, 40; Jur. St. A-65-66.) Thus, had the admissions committee followed strictly the PFYA in determining which qualified applicant should be admitted, no more than one minority applicant from these groups would have been admitted to the law school class in September, 1971. The inevitable conclusion which one must draw from these figures is that if only the mathematical indicators had been considered, the respondent Law School would have continued to be a "segregated" law school to all intents and purposes, which means it would have been effectively closed to *qualified* Black, Chicano, American-Indian, and Filipino-American applicants.[11]

While Mr. DeFunis contends that he "was denied entry into the University of Washington Law School by reason of his *race*," (Their emphasis. Pet. Br. 9.) the facts of this case simply do not support that conclusion. Rather, they indisputably show that of the 149 persons enrolled in the law school class commencing in September, 1971, all but 18 were of the white race and, of the approximately 330 offered admission,

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11. The minority admissions program at the Law School did not involve a "quota," although there is much discussion in briefs supporting petitioner attacking the idea of racial quotas. These attacks are irrelevant here. The purpose of the law school program was to expand, not restrict, the admission of minorities. Its effect was to increase, not reduce, the number of minority applicants admitted. No applicant was required to identify his racial or ethnic origin. There was no ceiling on minority admissions. Without distorting the conventional meaning of the term, there could not be a "quota" in such a system.

44 were of minority races, and the balance of 286 were of the white race. Since over 1,600 applied for admission, most of whom were qualified, and since there were only 150 places to be filled, whether or not special admissions programs for minorities were undertaken by the Law School and the University, numerous individuals in the same racial class as Mr. DeFunis would have to be denied admission even while the vast majority of those admitted came from his racial class. The most that can be said, therefore, is that while some were admitted and enrolled who, but for their minority race, might not have been admitted, no one was excluded by reason of his or her race, religion, or ethnic origin.

SUMMARY OF ARGUMENT

All law classifies and all law discriminates, but only that law which classifies or discriminates invidiously offends the Equal Protection Clause of the Fourteenth Amendment. The trial judge who ordered the admission to the Law School of the petitioner Marco DeFunis, Jr., did so because he understood *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955), to stand for the proposition that the Constitution forbids all consideration of race in a public school admissions policy.

Respondents contend that this is a misreading of the holding in both *Brown I* and *Brown II*. *Brown I* was explicitly clear in its identification of the invidiousness of racial discrimination in that case because it is psychologically harmful to black children. *Brown II* was concerned with the means of remedying that invidious racial discrimination.

There can be no doubt that the Supreme Court of the State

of Washington was correct in its findings that the challenged admissions policy was necessary to effect the compelling interest of that state in increasing minority participation in the legal education offered by its only state-supported law school and in increasing minority participation in the legal profession.

The Constitution has been *color conscious* since 1866 in permitting programs that are designed to correct the effects of slavery and racial discrimination. The purpose and effect of the Law School's program both dispense with the need for the strict scrutiny required where "suspect classification" or state action impinging on "fundamental interests" is concerned.

This Court's unanimous opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), said that school authorities may overcome the effects of past racial discrimination even when their school has never been guilty of racial segregation. That opinion also said that school authorities may use a racial classification to achieve an integrated classroom to prepare students for a pluralistic society. Both propositions particularly apply to legal education because it so much depends for its adequacy on association and interchanges among students.

Not only the minority students but all of the students at a law school have the right to expect their legal education to be conducted in integrated classes with students from all racial groups. It is the affirmative duty—certainly within the discretion—of those responsible for admissions to seek such a student body. It would be wholly incongruous to require (on the basis of the Equal Protection Clause) a program like that of which the petitioners complain here in an institution which formerly discriminated, and at the same time forbid the same program as a violation of the Equal Protection Clause at a university

whose record for nondiscrimination is beyond reproach. Most institutions cannot know in which category they belong. They have had occasion to ask, like President Odegaard at the University of Washington, "Where are the black students? Where are the black students?"

The admissions process followed by the University of Washington Law School in 1971 was an orderly technique for dealing with a massive number of law school applications, a method which permitted the use of committee discretion confined by pre-articulated standards, including the consideration of a race in order to produce a student body better reflective of the society as a whole, and safeguarded by the use of the deliberative process. The objective of the respondents' admission process, like that at most law schools in this country, was not only to improve the quality of education for all of the students in attendance but to conduct an admissions program in such a way that the historic under-representation of minority groups in the legal profession and in the law school classroom would be ameliorated rather than exacerbated. This program is to benefit the majority race of which Mr. DeFunis is a member just as much as it is to benefit the minorities specially considered. The interest of the majority race in an integrated society has been repeatedly recognized by this Court in such cases as *Peters v. Kiff*, 407 U.S. 493 (1972), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

The fact that the Law School did not disguise its program by calling it a program for "culturally deprived" or "economically deprived" members should not disqualify it. The reason race was used as a decisional component was because it was the only precise way to reach the problem addressed, namely racial under-representation.

If the decision below does not stand, every means available to the State of Washington to deal with a critical problem in education, with composition of the legal profession, and with *de facto* segregation in the state's only law school will have been foreclosed. Beyond the State of Washington and beyond the issues of a pluralistic legal education, a reversal of the decision below will endanger all affirmative action programs throughout the nation and across the entire spectrum of activities in which they are employed.

ARGUMENT

I.

CONSIDERATION OF THE RACE OF MINORITY APPLICANTS AS AN AFFIRMATIVE FACTOR IN ADMISSION TO THE LAW SCHOOL DOES NOT OFFEND THE FOURTEENTH AMENDMENT

This case commenced its long march to this Court when the trial judge in the King County Superior Court of the State of Washington ruled that

> "In 1954 the United States Supreme Court in *Brown v. The Board of Education* decided that public education must be equally available to all regardless of race.
>
> After that decision, the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion, the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause." (App. 56-57.)

That a decision by a trial judge in Seattle, Washington, ordering the admission of Mr. DeFunis to the only state-supported law school, should receive such widespread attention as

Judge Shorett's decision in this matter attests to the uniqueness of that decision.[12]

The case remains a challenging exercise because of the multiplicity of theories advanced, but its resolution should not be difficult because whatever theory is pursued, it leads to an affirmance of the result of the court below, *i.e.*, the Equal Protection Clause does not forbid consideration of minority races in achieving ethnic balance in higher education generally and more particularly in legal education.

A. *Since 1866, the Constitution has been "color conscious" to permit ameliorative programs to educate and otherwise benefit minority races.*

When the first Mr. Justice Harlan, dissenting alone in *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), said,

> Our constitution is color blind, and neither knows nor tolerates classes among citizens,

he went on to predict that the opinion of the other seven justices participating in the majority decision upholding a Louisiana statute which required separate railway carriages "for the white and colored races" would "in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." 163 U.S. at 559. Jim Crow was sanctified by that decision and, as every school child now knows, the Harlan prediction was correct. In 1954 with the first *Brown v.*

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12. See, *e.g.*, N.Y. Times, Sept. 26, 1971, Section I at 62. It also received widespread law review comments before a decision reversing by the Washington Supreme Court and in the absence of a reported opinion. See, *e.g.*, 21 American U.L. Rev., 736 (Sept., 1972); 49 Chi.-Kent L. Rev., 132 (Spring, 1972); 52 Boston U. L. Rev., 304 (Spring, 1972); 57 A.B.A.J., 1233 (Dec., 1971); *Commentary on the DeFunis Case*, 1 Balsa Reports, Newsletter No. 2, Feb., 1972, at 13; 25 Vand. L. Rev., 234 (Jan., 1972).

Board of Education case, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), this Court corrected the pernicious doctrine of *Plessy v. Ferguson*, by its ruling that "separate but equal" school facilities violated the Equal Protection Clause. But as *Brown II*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), teaches, those cases only *began* the long process of undoing the harm done, not only by the *Plessy v. Ferguson* doctrine, but the centuries of racial discrimination which preceded it.

Those cases, however, do not teach us that for all purposes and under all circumstances is the Constitution color blind. Rather, what *Brown I* and *II* and the cases which have followed them down to this very day tell us is that the Constitution is *color conscious* where procedures and policies are concerned with the correction of the effects of the racial segregation which *Plessy v. Ferguson* sanctioned. See, *e.g.*, *United States v. Jefferson County*, 372 F.2d 836 (5th Cir. 1966), *cert. denied* 389 U.S. 840, 88 S. Ct. 67, 19 L. Ed. 2d 103 (1967); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968); *Contractors Ass'n of Eastern Pa. v. Hodgson*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied* 404 U.S. 854, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971); *Carter v. Gallagher*, 452 F.2d 351 (8th Cir. 1971), *cert. denied* 406 U.S. 950 (1972); *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied* 402 U.S. 944, 91 S. Ct. 1612, 29 L. Ed. 2d 112 (1971); *Associated General Contractors v. Altshuler*, — F.2d —, 6 F E P Cases 1031 (1st Cir. No. 73-1250, Nov. 30, 1973).

Indeed, the 39th Congress, which proposed the Fourteenth Amendment for ratification by the states, entertained no doubt about the constitutionality and propriety of affirmative measures for the welfare and education of the former slaves. The purpose of the Act to Strengthen the Freedmen's Bureau, en-

acted over President Andrew Johnson's veto the month after proposal of the Fourteenth Amendment, was expressly declared to be enacted in behalf of "loyal refugees and freedmen" to secure to them "the freedom conferred by proclamation of the commander in chief, by emancipation under the laws of states, and by constitutional amendment." Act of July 16, 1866, Section 2, 12 Stat. 174.

Section 6 of the same Act departed from the term "freedmen" and confirmed land grants under instruction in 1863 by President Lincoln to "heads of families of the African race." 12 Stat. 175.

In 1968 this Court affirmed its expressed understanding that the Civil Rights Act of 1866 (42 U.S.C. § 1982) was designed explicitly to benefit the freed slaves when it affirmed the power of Congress to require that "all citizens shall have the same right . . . enjoyed by white citizens" to purchase housing on the authority given by the Thirteenth Amendment to enforce the abolition of slavery. *Jones v. Alfred Mayer Company*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 1189 (1968). The case confirms the power of the state to prohibit the imposition of the badges and incidents of slavery and recognizes the validity of legislation which singles out a race and confers benefits upon it for the purpose of correcting the effects of past injustices. It should be dispositive of this case since the powers that would eradicate vestiges of slavery cannot be "color blind." Slavery itself was not color blind.[13]

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13. See, also, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966), where a unanimous Court upheld the constitutionality of the Voting Rights Act of 1965 as a proper exercise of congressional authority under § 5 of the Fourteenth Amendment, stating "It was well within Congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement." 384 U.S. at 653.

There are other areas in which the Constitution has been color conscious. For example, the Congress has established the Bureau of Indian Affairs and required that hiring preferences be given to Indian Americans by that Bureau, 25 U.S.C. § 472 (1970), and has enacted legislation governing many aspects of the reservation-Indian's life, including matters of education, health, civil liberties, welfare, transfer of land, validity of contracts, testamentary dispositions and expenditures of tribal funds. See, generally, Title 25 U.S.C., *Indians*.[14]

B. *This Court has never yet held or said that race is a "suspect classification" requiring a compelling state interest in justification when the major purpose and effect is to extend equality to an under-represented minority race.*

The compelling state interest doctrine has its genesis in an unfortunate decision of this Court relating to Japanese-Americans during World War II. *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 195 (1944).[15]

But even in *Korematsu*, where this Court upheld that classification of Japanese-Americans for the purpose of deporting them from their homes "necessary" to fulfill the compelling state interest of waging war successfully, Mr. Justice Black prefaced the Court's opinion with the admonition that

> ". . . [A]ll legal restrictions which *curtail* the civil rights of *a single racial group* are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid

14. There seems little doubt that Indians "can only be defined by their race." *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 [Three-Judge Court, E.D. Wash. (1965), aff'd 384 U.S. 209 (1966)].

15. See Rostow, *The Japanese-American Cases—A Disaster*, 54 Yale L.J. 489 (1945).

> scrutiny. Pressing public necessity may sometimes justify the existence of such *restrictions*; racial antagonism never can." 323 U.S. at 216. (Emphasis supplied.)[16]

Thus, we see that the racial classification is "suspect" when the legislation creating it imposes legal restrictions which curtail the civil rights of those within the racial group.

It is clear that it was such a restriction that Mr. Justice Stone had in mind when he spoke of "discrete and insular minorities" which might call for a "more searching judicial inquiry" in his footnote 4 in *United States v. Carolene Products Company*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).[17] It is clear that it was such a limited concern that was stated by Chief Justice Warren in framing the question in *Brown v. Board of Education*, 347 U.S. 483:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, *deprive* the children of the *minority group* of equal educational opportunities?" 347 U.S. at 493. (Emphasis supplied.)

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16. Mr. Chief Justice Stone had used even stronger language in *Hirabayashi v. United States*, 320 U.S. 80, 100 (1943): "Distinctions between citizens solely because of their race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." The Court, nevertheless, upheld—regrettably—the conviction of a University of Washington student for violation of a statute applicable to him solely because of his race.

17. Mr. Justice Stone observed that in the case under consideration it was not necessary to consider whether the legislation should be subjected to a more exacting judicial scrutiny under the general provisions of the Fourteenth Amendment which might be required were the Court considering "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. at 152-53, n.4.

In all of the Court's modern rulings dealing with the effects of racial segregation, whether in education or in the use of public facilities, there is implicitly and sometimes explicitly recognized the fact that the racial classifications themselves generate "a feeling of inferiority as to their status in the community" on the part of the minority race. *Brown I*, 347 U.S. at 494. It is racial classifications which have this purpose or effect that are suspect.[18]

The facts before this Court in this case simply do not present the Court with a racial classification which curtails the civil rights of members of a single racial group nor do they present to the Court a need to justify restrictions against a

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18. If the Court still adheres to *Korematsu*, which we doubt, its result could only be justified by some compelling state interest. We also doubt that such racial classifications could ever be justified. See note, Developments—Equal Protection, 82 Harv. L. Rev. 1067, 1089, *et seq.* (1969) where it is observed in part as follows:

> "The results in the cases following *Brown* are explicable, however, without resort to a 'colorblind' principle. *Korematsu* had recognized that statutes which impose a burden on a racial group are immediately suspect and would be upheld only if the state could demonstrate a justification of overriding importance. In *Brown* the Court seems to have recognized for the first time that the system of racial segregation 'is usually interpreted as denoting the inferiority of the negro group' . . . . Given this burden which segregation imposes on a single racial group, the summary opinions in the subsequent segregation cases may indicate that the states not only failed to show a strong justification for the burden, but simply failed to show any justification at all.
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> . . . .
>
> It now seems doubtful that any objective short of the exigencies of war-time emergency would justify the imposition of any long-term burdens on a racial basis, especially racial segregation. Indeed, even under crisis conditions, it is not clear that a state would be permitted to impose serious deprivations because of an individual's race. Nevertheless, the rejection of the 'colorblind' interpretation of the equal protection clause will allow the courts more flexibility in appraising measures which have no discriminatory purpose. For example, a state may be permitted to channel compensatory benefits to a racial group whose members have suffered because of prior state discrimination."

single racial group since this case presents no restrictions on the civil rights of any person.[19]

This case does present this Court with an opportunity to correct the misunderstanding evidenced in the petitioners' brief and those of the *amici curiae* supporting the petitioners that racial classifications, regardless of the purpose for which they are created, must always be treated as "suspect," and must always be justified by showing their necessity for some compelling state interest. Mr. Justice Marshall only recently objected once more to what he called the Court's "rigidified approach to equal protection issues." (Marshall, J., dissenting

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19. There is a dangerous suggestion in the briefs of some *amici* supporting petitioners that minority admissions programs are invidious in that they generate feelings of inferiority among minority students and create a "stigma" with respect to minority lawyers. The argument could be dismissed as frivolous inasmuch as minority students and lawyers themselves are strongly in support of minority admissions programs. (See the *amicus* briefs in support of respondents filed by the National Conference of Black Lawyers, the Mexican Defense and Educational Fund, American Indian Law Students Association, etc.) It will be time to worry about "stigma" when those allegedly stigmatized have become sufficiently concerned to call for abolition of minority programs.

But dismissing the argument as patronizing does not give it its due, for the argument about "stigma" is self-fulfilling and dangerous. Its constant repetition helps generate a belief that academic standards at law schools are less rigorous for minority students, and that bar examiners are more indulgent in evaluating the qualifications of minority applicants to the Bar. Neither of these beliefs is true. Neither is supported by anything in the record before this Court. The continuing unsupported repetition is itself a source from which some "stigma" could arise. What is true is that all law students face some degree of risk of academic failure. It is also true that academic attrition among those with higher degrees of statistical risk is likely to be higher. But for those who succeed in graduating and who pass bar examinations, the degree of initial statistical risk becomes irrelevant. Certainly it has never been the practice to deprecate the quality of white lawyers who have succeeded in law school and in bar examinations on the grounds that there was some degree of risk initially that they would not be able to accomplish those goals. It is unconscionable to treat minority lawyers on any other basis. For all students, accomplishments of this order should be celebrated for what they are, not deprecated by reference to prior statistical speculations about what they might have been.

in *Marshall v. United States*, — U.S. —— [No. 72-5881, January 9, 1974].) Whether it has followed a "rigidified approach" or not, this Court has never yet suggested that racial classifications used to overcome the effects of past racial discrimination, or used to educate for a pluralistic multi-racial society, must sustain the heavy burden called for by the "suspect category" concept.[20]

In 1967 four distinguished professors of constitutional law published a casebook which says:

> "The highest court of no state and the court of appeals in no federal circuit, however, has yet applied the Harlan ['color-blind constitution'] metaphor to strike down a local effort to reduce racial imbalance in the schools. The far more troublesome questions are related to . . . what affirmative action the constitution may require the school authorities to take to reduce an existing imbalance." 2 FREUND, SUTHERLAND, HOWE, BROWN, CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS, 1140 (1967).

Annual supplements have reported no change. This Court's decision, if the Washington Supreme Court were reversed, would be new and unique, as well as unfortunate.[21]

C. *Whether or not race is now a "suspect classification" whatever the purpose of its use, a compelling state inter-*

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20. That strict scrutiny should not be applied to the racial classification in this case is the conclusion reached in Comment, *Ameliorative Racial Classifications Under the Equal Protection Clause:* DeFunis v. Odegaard, 1973 DUKE L.J. 1126. Another doctrinal analysis might be suggested by Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

21. The possibilities of discrimination against a Caucasian majority by state institutions have always been so remote that it has never been a problem considered worthy of attention. See, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 22, (1948) where this Court observed that it had been cited no case in which a court, state or federal, "had been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color."

est justifies the minority preference in the Law School's admissions program.

Mr. DeFunis never contended in the court below that race is a suspect classification when discrimination is benign, favoring a minority race, and we do not now concede that we must sustain a strict scrutiny burden by showing "a compelling state interest." The Washington Supreme Court's holding appears to be unique in imposing that burden in a case involving racial classifications favoring "discrete and insular" minorities.

But the Washington Supreme Court was correct when it held that the consideration of the race of applicants in determining admissions to the state's Law School was necessary to the accomplishment of a compelling state interest and finding, *inter alia*, that

> "The state has an over-riding interest in promoting integration of public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling." 82 Wn.2d at 33. (Juris. St. A-24.)[22]

Recalling the language of this Court in *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), the Washington court found that the state has an over-riding interest in providing *all* law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation. It recognized the critical role the legal profession plays in the policy-making

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22. The gross under-representation of minority lawyers in the profession nationally is also acute in the State of Washington. See Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069. For example, a recent study for the National Bar Association by the Honorable Edward B. Toles, Referee in Bankruptcy in the U.S. District Court (N.D., Ill.)

sector of our society and, to properly prepare lawyers, the educational interests of the state in producing a racially-balanced student body at the Law School was found to be compelling. 82 Wn.2d at 35 (Juris. St. A-25-A-26.) As the court below concluded,

> "The consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived." 82 Wn.2d at 35 (Juris. St. A-26.)

In short, the lower court found that the state had two compelling interests: one in the adequacy of its educational process and one in the adequacy of its legal profession. In this latter respect, minority admissions programs have among their objectives that minority representation can be increased among judges, law teachers, prosecutors, hearing examiners, staff counselors, and other law-trained government officials; that a fair representation of minority group members has the kind of access to elective office legal education has always provided; that minority communities can have the kind of leadership law-trained persons have historically furnished; and that young people of minority status have the kind of models for building career aspirations in law which is the only long range solution to the problem.

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and Chairman of the NBA's Committee on the Judiciary, showed that in the State of Washington there was one white lawyer for every 720 whites in the state, and one black lawyer for every 2,436 blacks in the state. (The Toles' report is reprinted in the Congressional Record for September 2, 1970, p. 30786.) See also McPherson, *The Black Law Student*, THE ATLANTIC 93 (April 1970) at p. 93 where he finds ". . . that there is one lawyer for every 637 persons in the United States, but only one black lawyer for every 7,000 black persons."

While respondents have never supposed that they are required to justify the affirmative consideration of race in their admissions policy by showing that it is necessary to fulfill a compelling state interest, they do maintain that if such a justification is required, the conclusion reached by the Supreme Court of the State of Washington should be accorded special respect. This case involves legal education in a state in which its Supreme Court exercises responsibility for an integrated Bar (Rev. Code of Wash., Ch. 2.48), has special concerns with the character and composition of that Bar, and is particularly knowledgeable in both an official and personal sense with legal education in the state. There could be no more authoritative assessment than that made by the Washington State Supreme Court of the compelling nature of the state interest or of the impossibility of achieving ethnic balance by any other means.

Respondents further urge that the interest has been recognized as compelling not only in the State of Washington but in the nation as a whole, both as it respects educational values (see, *e.g.*, *amicus* brief of the American Association of Law Schools) and as it affects professional objectives (see, *e.g.*, *amicus* brief of the American Bar Association). A practice like that at the University of Washington's Law School is virtually universal among accredited law schools in this country. (See *infra* pp. 48-49.)

Moreover, the federal government has recognized the necessity of affirmative action programs to correct the effects of past discrimination and has required its contractors, including the University of Washington, to adopt affirmative action programs to assure employment of significantly larger numbers

of minorities and women, programs which, by their terms, require consideration of race by these public agencies.[23]

In its enforcement of Title VI of the Civil Rights Act of 1964, (78 Stat. 252, 42 U.S.C. §§ 2000d *et seq.*), which prohibits discrimination on the grounds of race, color or national origin in federally-assisted programs, the Department of Health, Education and Welfare, Office of Civil Rights, has promulgated rules and regulations requiring recipient institutions which have "previously discriminated against persons on the grounds of race, color or national origin" to take affirmative action to overcome the effects of past discrimination. Those same regu-

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23. Executive Order No. 11,246, as amended, 3 CFR 173 (1973 Supp.) requires federal contractors not to discriminate against employees or applicants for employment because of race, color, religion, sex or national origin and to ". . . take affirmative action to insure that applicants are employed and that employees are treated during employment" without regard to these factors. As the publication of the Office of Civil Rights of the Department of Health, Education and Welfare, *Higher Education Guidelines, Executive Order 11246* (October 1, 1972), states it at p. 3:

> "Affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the Executive Order is that unless positive action is undertaken to overcome the effects of systemic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the *status quo ante* indefinitely."

The U.S. Department of Labor's Office of Federal Contract Compliance has adopted complex rules requiring federal contractors, such as the University of Washington, to "determine whether women and minorities are 'underutilized' in its employee work force and, if that is the case, to develop as a part of its affirmative action program specific goals and timetables to overcome that underutilization." "Underutilization" is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability." See 36 *Fed. Reg.* No. 234, Dec. 4, 1971, and Chapter 60 of Title 41 C.F.R., Part 60–2.

Must not the respondent University (and all colleges and universities) give special consideration to the race and sex of applicants to its limited student places if it is to increase the "availability" of minorities and women for the employment opportunities it offers?

lations *permit* recipient institutions that have never discriminated to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin." 45 C.F.R., Part 80, § 80.3(b)(6); 38 *Fed. Reg.* 17979, 1973. These statutes and regulations apply to "any programs or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

The respondent University of Washington is a recipient institution covered by these H.E.W. regulations which has never had a policy of discrimination on the basis of race, color or national origin. Its admission program here being challenged is precisely the affirmative action program permitted by the above-cited regulation. Can it seriously be argued at this time in the history of our country that such a program is not necessary to serve the compelling *national* interest in alleviating the effects of over 300 years of racial discrimination practiced and sanctioned with the force of law in this nation?

D. *The minority admissions program is constitutional under any test of scrutiny—strict, rational, or intermediate—because its purpose and effect are to improve the education, the Bar, and the Bar's service to the public, including the members of majority as well as minority races.*

The absence of a purpose to discriminate against a minority race does not, of course, constitutionally justify a purposeless or irrational discriminatory effect. There is good authority, however, that if the dominant purpose and effect of the program are neither irrational nor invidious, the Court will dispense with the strict scrutiny attendant on suspect classification or state action impinging on fundamental interests, even if those interests are incidentally affected.

Mr. Chief Justice Warren, in *McGowan v. Maryland*, 366

U.S. 420 at 427, 81 S. Ct. 1101 at 1105, 6 L. Ed. 2d 393 (1961), stated the general rule as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. [Citing cases.]"

The Court there was concerned with whether or not Maryland's Sunday closing law was a violation of the Equal Protection clause of the Fourteenth Amendment and found that, notwithstanding certain exemptions in the Maryland law allowing certain types of activity, the results of such statutory distinctions were not "invidious" or "unreasonable," and thus did not violate the Equal Protection clause.

It was only when asked to determine whether these laws violated the Establishment and Free Exercise clauses of the First Amendment did the Court subject them to the "close scrutiny demanded of us when First Amendment liberties are at issue." The majority of the Court was willing to accept the Maryland Supreme Court's determination that the statute's purpose and effect were not to aid religion but to set aside a day of rest and recreation, and did not affect the right to free exercise of religion.

The dissents of Mr. Justice Douglas to the *McGowan* decision, 366 U.S. 420, and of Mr. Justice Brennan and Mr. Justice Stewart in the related Pennsylvania case of *Braunfeld v.*

Brown, 366 U.S. 599 (1961), were based on the ground that the statutes in question violated the Free Exercise clause of the First Amendment and could not survive "close scrutiny."

While the statutes under consideration in *McGowan* and its companion cases admittedly imposed a burden on minorities who worship on other days than Sunday, or on no days, the Court looked to the *purpose* for which those statutes were enacted and a majority found that they had not been for the purpose of assisting Sunday worship or to discriminate against Jews and Seventh-Day Adventists. This was despite a clear adverse effect on the minority complainants, in deprivation of what would have been a fundamental First Amendment right had the purpose been to prefer Sunday worshippers or to deter Saturday worshippers.

Similarly, in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404, 22 L. E 2d 739 (1969), this Court was unwilling to strike down an Illinois statute providing for absentee balloting by certain classes of individuals, upon the ground that Mr. McDonald and his co-appellants (unsentenced inmates of the Cook County jail who were qualified Cook County electors who could not appear at the polls because they were charged with non-bailable offenses or because they had been unable to post the bail imposed by Illinois courts) were not included in the class benefited. As Mr. Chief Justice Warren stated in the opinion for the Court, 394 U.S. at 807-808:

> "Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise.
>
> . . . .

> Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. [Citing *McGowan v. Maryland, supra*; *Kotch v. Board of Riverport Pilot Commissioners*, 330 U.S. 552, 67 S. Ct. 910, 91 L. Ed. 1093 (1947); *Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911)]"

On this analysis, the law school's minority program must be upheld, notwithstanding Mr. DeFunis' complaint, if it bears a rational relationship to a legitimate state end, a finding that can hardly be disputed on this record.

E. *The University has an affirmative duty in pursuit of its educational mission which requires it to take reasonable steps to seek and maintain a racially integrated student body.*

This Court's concern for and recognition of the importance of a pluralistic integrated educational opportunity for *all* students attending publicly supported educational institutions predate its landmark decisions in *Brown v. Board of Education*. Particularly is this so in the fields of higher education. Thus, in *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), this Court was considering the petition of an applicant who was rejected from the University of Texas

Law School "solely because" he was a Negro. Mr. Chief Justice Vinson, speaking for a unanimous Court, observed:

> "... [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." 339 U.S. at 634.[24]

More recently this Court in its unanimous opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267 (1971), recognized the discretionary authority of school officials to correct the effects of past discrimination as a matter of important educational policy. While the Court there was concerned with the judicial authority to correct failures of school authorities in "their affirmative obligations to eliminate from the public schools all vestiges of state-imposed segregation," it recognized that

> "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflect-

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24. The Advocate Society etc., in their brief *amici curiae* in support of petitioner, p. 13, equate *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 76 S. Ct. 464 (1956), with the facts in this case because the black plaintiff there was denied admission solely because of race to the University of Florida School of Law. We have no argument with that decision, but do not believe it applies to the facts of this case since Mr. DeFunis was not denied admission to the Law School solely because of his race, and, unlike Mr. Hawkins, he is not black.

> ing the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16.

Surely it is as important for school authorities to have the authority to prepare law students to practice law in a pluralistic society, and to assume the roles of leadership that society so frequently accords to lawyers, as it is to prepare students in primary and secondary public schools to live as members in a pluralistic society. As has already been noted, this Court in *Sweatt v. Painter* long ago recognized legal education as especially dependent for its adequacy on association and interchanges among students.[25]

It is true that university and law school education is different from primary and secondary education, partly because a state does not attempt to provide, indeed it cannot provide, legal education to all qualified applicants. The University of Washington could only do so if it followed the suggestion in the Washington Supreme Court's dissenting opinion that classes be held in the University stadium (which seats more than 50,000) and all applicants with certain grades and certain prescribed courses be admitted. As Chief Justice Hale wrote, this would be fair but, as even he recognized, it would not be effective. (82 Wn.2d at 66; Juris. St. A-55.) At least since Dean C. C. Langdell introduced the case method at Harvard Law School, legal education has been increasingly participatory. It

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25. See, also, *Sweatt's* companion case *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S. Ct. 851 (1950), where this Court recognized the heavy responsibility imposed on a state to provide *truly* integrated facilities in its graduate and professional schools in order to afford the best possible training for the students who are so likely to become future leaders of the state and nation.

has been Socratic. Socrates could not stand on the fifty-yard line and interrogate Alcibiades on the rim of the stadium behind the goal posts.

The most sensitive decision in higher education in a generation when sensitive students insist that they must not be stapled, bent, or mutilated is the balance between numbers of students and quality. Marco DeFunis, Jr., will complete his education several months hence. In the judgment of the Board of Regents of the University of Washington and the Dean and faculty of its Law School, it will be a better education because he was not educated in classes held in the stadium. It will be a better education because it was not education in a racially segregated student body. That judgment respondents defend as right; they also defend it on the ground that it is an educational judgment which school authorities are properly charged with making, whether right or wrong.

F. *Preferential admissions policy benefited the "non-minority" class of which Mr. DeFunis is a member*

At the trial level, before the Washington Supreme Court, and in respondents' Motion to Affirm before this Court, this issue was raised: If no minority preference had been extended, would Marco DeFunis have been admitted to Law School? Because Mr. DeFunis was in the bottom quartile of a waiting list, it seemed clear that he would not have been reached had no minority students been admitted on any basis, preferential or otherwise. Respondents urged that for this reason he had no standing to raise the equal protection issue. The Washington Supreme Court found it unnecessary to resolve the factual issue and held, in effect, that Mr. DeFunis had standing whatever his prospects. (82 Wn.2d at 23-24; Juris. St. A-14-15.)

It is clear that absent the preferential admissions policy, a larger number of non-minority students would have been admitted. There may well be considerations which justify or compel resolution of the issue on a more liberal than usual standing basis. Hence, we do not press the standing issue. However, it is of the greatest importance to recognize that the issue is not one of competition between applicants of minority and of a majority race when the *true* interests of *all* applicants are appraised. In *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972), this Court recognized a right of all races to be free of the stigma and odium of segregation. Thus, in *Peters v. Kiff*, the white accused was found to have standing to challenge exclusion of Negroes from the grand jury indicting him and the petty jury trying him. And in *Trafficante*, this Court held a white tenant has standing to challenge the policy which forces him to live in a white segregated ghetto. Educational values were not involved in those cases, but the cases, nevertheless, make clear the interest of the majority race in non-segregation. Education of lawyers for the 21st century is at least as important as the apartment where one now lives. Particularly is this true when education—like legal education—depends more upon what happens between student and student than what happens between student and professor.

If the University and its Law School had pursued an admissions policy which was based solely on mechanical indicia of success, choosing those whose indicators predicted the greatest success, the evidence shows that few, if any, minority members would have been a part of Mr. DeFunis' law school class. What *Trafficante* and *Peters v. Kiff* teach us is that under those circumstances a successful white applicant could well

have successfully challenged such an admissions policy because it denied him the opportunity of a fully integrated legal education.

G. *The preferential minority admissions policy at the University of Washington is arguably compelled and, hence, it would be incongruous to forbid it on constitutional grounds.*

While there are no statutes or officially promulgated regulations by which white applicants to the University of Washington and its Law School have ever been preferred, the almost totally all-white character[26] of the student body at the Uni-

26. Dr. Charles E. Odegaard, one of the respondents in this action and President of the University during all times leading up to these proceedings and since 1958, testified at the trial of this matter as follows:

"[In 1959] this collective statement on nondiscriminatory practices in the University [was issued] and affirmed that in a sense what I suppose you could call an open door, and that is the way the matter stood for several years . . .

. . .

Well, I think most of us, at the time, felt that the University policy was clear and was sufficient as it was announced in 1959.

At Commencement in 1963, when a large number of students, all the schools and colleges granting degrees at the University, the students filed by. I walked out with the regents following immediately after me, and we went into the area where we change from academic garb to conventional street clothes. As soon as we got in there, the question was raised—I don't know which individual it was, it was sort of in all our minds, because we had been more conscious of racial problems here in Seattle and we said—'Where are the black students? Where are the black students?' . . . . [I]t just left us with the question, why is it?' With our open door policy, we had so few that seemed to be coming through. If they cannot go through these halls and acquire the kind of educational background required for many of the roles in society, they obviously are not going to share more fully in the American way of life and feel a part of the society into which they have been born.

. . .

Well, more and more as we dug into this, we began to realize that there can be a presumption of legal equality or procedural equality at the University but, in fact, cultural conditions which deter certain persons, either by reason of extreme poverty or what frequently goes with this, by reason of separation from the conventional life of the times, and even from the conventional schools of the area, from

versity and its Law School before affirmative actions were taken to increase minority representation would, if the student body had been a jury, compel the prosecution to prove the absence of intentional or systematic discrimination. *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954).[27]

Clearly, if the University were chargeable with *de jure* discrimination, either because of statute, regulation, or demonstrable custom—or because of a shift in burden of proof which the University could not meet—a compensatory admissions program would be a recognized corrective, and some corrective measure would be compelled. *Green v. County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

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acquiring the backgrounds necessary to move into more responsible roles in American life.

So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produce something other than equality was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington . . .

Meanwhile, in the United States of America, there was developing, also, an awareness that something more was needed, and I think the language—we didn't think it up in the beginning—I think it is now the national parlance, 'affirmative action', and the University, like many other institutions, has come under the continuous scrutiny and review to the degree with which it is affirmatively complying with the expectation, with the equalization of opporutnity in the United States.

We are, indeed, under compulsion to be affirmatively complying in achieving a better distribution of opportunity." (St. 221-225.)

27. Although the date of the beginning of affirmative action admissions at the University of Washington Law School was not discussed at the trial, one exhibit (Exh. 7, St. 134) showed that there were nine black students enrolled in the Law School in 1969. Law School records show that the PFYA's of those students were 76.4, 72.8, 72.4, 71.2, 68.7, 68.3, 68.0, and 65.8. It is thus clear that had there not been a minority admissions program in operation between 1967 and 1969, the school would have been almost exclusively white.

It would be wholly incongruous to require a program like that of which Mr. DeFunis complains at a state university with a past history of racial segregation and, at the same time, forbid that same program as unconstitutional at a state university whose record for non-discrimination is beyond reproach.

The State of Washington, like the other Pacific Coast states, has been the beneficiary (or the victim) of a great population influx of all races since World War II. Washington could not keep any of these migrants out of the state even if it chose. *Edwards v. California*, 314 U.S. 160, 62 S. Ct. 164 (1941). Nor does the University of Washington and its Law School restrict admission to residents of this state. The educational disadvantages of segregated education elsewhere have left their mark on the applicants who seek to study law in Washington. This Court has never considered the problems created by racial segregation to be regional. Mr. Chief Justice Warren traced the origins of the doctrine of racial segregation to the City of Boston where it was sustained in a court challenge in 1850. *Brown v. Board of Education*, 347 U.S. 483 at 491, n.6; 74 S. Ct. 686 at 690; citing *Roberts v. City of Boston*, 5 Cush. 198, 59 Mass 198 (1850).

One need not take sides on the issue which divided the Court in *Keyes v. The Denver School District No. 1*, 409 U.S. 818, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973), whether the *de jure* versus *de facto* distinction has validity and, if so, what are the distinguishing marks of each. The fact is that the University of Washington's Law School would be a segregated school of some kind but for a compensatory admissions program. There is no decision of this Court which holds or hints that a university is precluded, because it has never been

guilty of racial discrimination, from doing what it would be compelled to do had it intentionally discriminated against a minority race at an earlier time in its history.

Nor do we agree with the Jewish Rights Council (*Amicus* Br. 12) and the Advocate Society etc. (*Amici* Br. 16.) that this Court's statements in *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), should disqualify the admissions program here challenged. While the Court there was concerned with the application of Title VII of the Civil Rights Act of 1964 (78 Stat. 243, 42 U.S.C. §§ 2000a-2000e-15) to the use of testing devices which had the effect of excluding racial minorities from employment opportunities, Mr. Chief Justice Burger held that

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430.

The University of Washington Law School's admissions policy (no more than Title VII does for employment) does not "guarantee" a minority applicant a position at the University of Washington Law School regardless of his qualifications and only because he is a member of a minority group. Even by the mechanical indicators, combined with the special training afforded by the CLEO institutes, no one was admitted to Mr. DeFunis' law school class nor invited to attend the University of Washington Law School who was not predicted to succeed. But if only those who were predicted by the test scores and grade point averages to have the greatest success were admitted, few, if any, minorities would have been invited to attend the University of Washington's Law School Class of 1974.

H. *Objections to choice of minority groups and to explicit identification of "race" are without merit.*

1. The choice of which minority groups would be affected by the program was determined by the program's objective: to alleviate their under-representation in the school and the profession.

The Law School's published admissions standards (St. 407, Exh. 45.) made no reference to the specific minority groups which would be affected by the consideration of race. In the year in which Mr. DeFunis applied to the Law School, the testimony below shows that the consideration of race affected principally black, Chicano, American-Indian and Filipino applicants. (St. 351.) It has been suggested in some of the *amicus* briefs supporting the petitioner that the process was defective in that Asian Americans generally, and possibly other minority groups not listed, should have been included in the Law School's minority admissions program.

The suggestion apparently is that any minority group which has been deprived should be entitled to inclusion in a program of this kind and especially those groups whose deprivation has taken place in the geographical area in which the law school sits. The premise of this contention is simply mistaken. The Law School's program, as indicated clearly by the testimony below, was not primarily intended to redress wrongs done to minority group members individually, nor only to compensate groups who may have been subjected to deprivations by the State of Washington. The objective was different. It grew from the fact that law schools have historically been part of the problem of under-representation of minorities in the profession. In earlier days, there were in the country patterns of discrimination which deprived minority applicants of oppor-

tunities for legal education.[28] Today, mounting admissions pressure and unnecessarily strict reliance on numerical admissions predicters are having precisely the same effect.

The adoption by today's law schools of minority admissions programs marks an attempt by the schools to cease contributing to the problem and to begin assisting in its solution. The objective of the respondent school's program, therefore, was simply to conduct an admissions program in such a way that the historic under-representation of all racial minority groups in the legal profession and in the law school classroom would be ameliorated rather than exacerbated. With this objective, there was no need to extend the application of preferential standards to applicants from minority groups which in the applicant population of a particular year were sufficiently well represented as to ensure the admission of a sufficient number of such minority group members without respect to any minority admissions program.

The committee specifically addressed the question of the appropriate treatment of Asian American applicants generally, and concluded that "on the basis of the . . . large number of Asian American applications and the significant number that had been accepted in the . . . ordinary review of the files, that that group, for this purpose, would not be treated as a minority group." (St. 352.)[29] Since 1971, variations in the applicant population have resulted in the preferential admission of some Asian applicants.

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28. Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069. The 1970 University of Toledo Law Review devotes its entire volume to a symposium on the problems of minority access to the law schools and the legal profession.

29. Other law schools have reached the same conclusion for a particular year regarding Asian Americans. See, *e.g.*, the statement of the Yale Law School in *1972-73 Pre-Law Handbook—Official Law School Guide*, p. 345.

The inclusiveness of the group affected, therefore, was specifically related to the problem being addressed.

2. Why the Law School chose "race" as the standard rather than "cultural deprivation" and/or "economic deprivation."

Some of the *amici curiae* supporting the petitioners argue that while the program followed at the University of Washington Law School does not pass constitutional muster, the Law School, as well as other institutions of higher education, must affirmatively seek to correct the effects of past racial discrimination in this country. Yet they argue that only those programs which do not consider race can pass the constitutional standa ds they support. (See, *e.g.*, Brief of Advocate Society, etc., Part III, pp. 25 ff.)

It is true that in some institutions of higher education affirmative action programs are couched in such terms as "for the culturally deprived" or "for the economically deprived." Since such programs are not described in terms of the racial minorities to be benefited, it is argued that they may pass the constitutional tests even though it is widely acknowledged that they are, indeed, intended to correct the effects of past racial discrimination.

As has already been observed, the law school program was not designed primarily for the purpose of benefiting the minority applicants who would be admitted under that policy, but was specifically undertaken to correct racial imbalances not only in the law school but in the legal profession generally. Most institutions pursuing such objectives have now abandoned the timid, euphemistic and vague jargon of "disadvantaged," "culturally-deprived," and "economically-deprived" for the more straightforward recognition that the programs are

designed for racial minorities and are, therefore, called special programs for "minority" students. The Council of Graduate Schools in the United States reported in 1973:

> "Finally, it is clear that for almost all institutions the students who are recruited into their special programs are identified as 'minority' students rather than 'disadvantaged.' While it is well known that not all minority students are disadvantaged, for the purposes of institutional policy and efforts, a minority designation is operationally the most significant descriptor."[30]

Since the Law School was specifically concerned about the under-representation of certain racial minorities in the Law School and in the legal profession, it chose the most precise decisional component possible: race. In doing so, it followed the almost universal practice of higher educational institutions throughout the country that are designing and implementing special programs for minorities.

II.

IF RACE IS FORBIDDEN AS A FACTOR, LAW SCHOOLS ALL OVER THE UNITED STATES MUST ABANDON AFFIRMATIVE ACTION PROGRAMS AIMED AT INCREASING MINORITY REPRESENTATION

The problem which led to the law school admissions program here challenged is universally recognized. The Univer-

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30. Hamilton, *Graduate School Programs for Minority/Disadvantaged Students*, Report of an Initial Survey, Graduate Record Examinations Board, Council of Graduate Schools in the United States, Princeton, New Jersey, 1973, a report on a comprehensive survey sponsored by the Council of Graduate Schools in the United States and the Graduate Record Examinations Board of special programs for minority *graduate students* at the 302 member institutions of the Council of Graduate Schools in the United States. Copies of the report are available at the Educational Testing Service, Princeton, New Jersey 08540.

sity of Washington School of Law is only one of many law schools throughout the nation which have adopted special admissions policies for minority applicants, aimed at increasing the representation of certain racial minority groups in the law schools and the Bar.[31] The proceedings of the 1970 annual meeting of the Association of American Law Schools reported that only two of all the schools reporting to the AALS have not applied special standards in admitting minority students.[32] The 1973 publication of the Association of American Law Schools and the Law Schools Admissions Council, entitled *1973-74 Prelaw Handbook—Official Law School Guide* (1973-74), was published to assist persons seeking admission to the accredited law schools of the United States. Such accredited schools were invited to submit for publication information about their prerequisites for admission. Thirty-eight schools presented statements concerning their special minority programs. While the statements and programs may vary from institution to institution, and while all institutions did not include statements concerning their minority admissions pro-

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31. The American Jewish Congress in its *amicus curiae* brief in support of petitioner at page 12 asks whether it can "be seriously urged that these white attorneys [Jack Greenberg, Anthony Amsterdam and Michael Meltzner] are unable to understand, empathize with, articulate and represent the views, needs and interests of minority groups to which they do not belong but whose cause they frequently plead?" Of course, we do not. On the contrary, we are grateful for the splendid services those attorneys and many others have rendered in the civil rights movement for the benefit of all Americans not just the victims of racial discrimination.

However, until black people have a choice of a black lawyer or a white lawyer—until all races are adequately represented at the Bar—we will not have accomplished the purpose of the Thirteenth, Fourteenth, or Fifteenth Amendments, nor can all the white lawyers in the land persuade black people that all persons are equal before the law. See, Comment, *Selected Bibliography: Minority Group Participation in the Legal Profession*, 1970 U. of Toledo L. Rev. 935.

32. *The Law Schools and the Minority Group Law Students, A Survey for the American Association of Law Schools Committee on Minority Groups*, p. 1, § II.

gram for publication in the *1973-74 Prelaw Handbook*, the following are excerpts from some of those public and private institutions that did:

University of Alabama—"There is a special program involving recruitment, admissions, and financial aid for students who are members of minority groups." p. 69.

Hastings College of the Law, University of California—"Hastings has a large affirmative program for the admission of members of minority groups." p. 99.

University of Colorado—"The School of Law is interested in increasing the number of persons from minority groups in the practice of law. Accordingly, a special program has been established for members of minority groups whose credentials are somewhat below those ordinarily required for admission. The program includes eight weeks in the summer immediately preceding the first year of study, as well as academic assistance during the first year . . . ." p. 119.

University of Illinois—"The Illinois Equal Opportunity Fellowship Program is a special program for minority group applicants." p. 175.

University of Kentucky—"Applicants who are members of minority groups are considered specially by the admissions committee, particularly if they have completed a preparatory program." p. 187.

The University of Michigan—"Black students and persons from disadvantaged backgrounds are given special consideration." p. 212.

University of Minnesota—"Special programs of recruitment, admission, and financial aid exist for minority group students." p. 215.

University of Pennsylvania—"For the class that entered in September 1972, the median LSAT score was 685 and the median cumulative undergraduate grade-point average was 3.55. In the case of minority students, the median

LSAT score was 544 and the median GPA was 2.92." p. 263.

Rutgers—The State University—"There is a special program involving recruitment, admission and financial aid for students who are members of minority groups." p. 277.

University of Utah—"There are special programs involving recruitment, admissions, tutorial assistance, and financial aid for students from disadvantaged and minority groups." p. 331.

University of Wisconsin—"There is a special program involving recruitment, admissions, and financial aid for students who are members of minority groups." p. 361.[33]

The foregoing indicates the impact which this Court's decision will have not only upon the disadvantaged minorities of this country, but also upon its law schools and the legal profession.

The problem of minority admissions in law schools today is especially critical since the phenomenal growth of applicant populations and the very small percentage of minority applicants in those populations mean that minorities will be virtually excluded by any selection criterion that does not include some racial component.[34] All over the land, not just in those schools which have had a history of segregated school facilities, law schools have in the last few years invited black Americans and other historically deprived minorities to take the first step in joining the legal profession. This case will

33. See also pp. 9-10 of the *1973-74 Prelaw Handbook*. Special minority admissions programs have also been in effect at Yale Law School (See *1972-73 Prelaw Handbook—Official Law School Guide* (1972-73) p. 345) and at Harvard Law School (See McPherson, *The Black Law Student*, The Atlantic, April, 1970, p. 93.).

34. For general discussion of this aspect of the problem, see Andersen, *The Admissions Process in Litigation*, 15 Ariz. L. Rev. 81, 100-02 (1973).

determine whether or not those invitations, insofar as they extend preferential consideration in admissions, are to be canceled by implications of an amendment to the United States Constitution whose primary purpose was to guarantee black Americans equal protection of the laws.

CONCLUSION

For the reasons set forth herein, as well as those stated by the *amici* supporting the respondents, the decision below should be affirmed.

Respectfully submitted,

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January 29, 1974

APPENDIX A

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APPENDIX A

While neither petitioners nor *amici* supporting them rely on the dissenting opinion of Chief Justice Hale in the court below to support their arguments, respondents believe that his opinion is sufficiently misleading that is would be helpful to this Court to have before it a detailed analysis of the treatment of facts in that opinion.[1]

The Dissenting Opinion By Chief Justice Hale In The Decision Of This Case By The Washington Supreme Court Relies Upon Substantial Errors of Fact.

The policies, evaluative criteria and procedures followed by the Admissions Committee in the process of selecting applicants for admission to the Law School in 1971 are fairly and accurately described in the statement of the facts in the decision of the Washington Supreme Court (quoted at pages 3-15 of this Brief) and in greater detail in the Answers To Interrogatories Propounded By Plaintiffs prepared by Professor Richard O. Kummert which were admitted in evidence and are printed in the Single Appendix. (St. 56, S. App. 23, particularly at 29-37.) Those descriptions of the selection process are supported by other essentially uncontradicted evidence in the trial record. The record wholly shows that the Law School acting through its Admissions Committee conducted the admissions selection process carefully, fairly, rationally and systematically. Despite their difference of opinion on the constitutional issues presented by certain of the admission policies of the Law School, neither the trial court nor the majority justices of the Washington Supreme Court found reason to criticize the soundness and propriety of the decision-making process employed by the Law School.[2]

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1. Dean Richard S. L. Roddis of the University of Washington Law School assisted in the preparation of this appendix.

2. In his oral decision, the trial judge, Judge Shorett, after expressing his opinion that the minority admissions policy of the Law School constituted a denial of equal protection, stated that "The other claims made by the plaintiff are, in my opinion, without merit." (S. App. 57.) And as the opinion of the Supreme Court of Washington pointed out, the trial court refused to find that the standards and procedures for selection were deficient. (82 Wn.2d 11, 39, Jur. St. A-29.) The Supreme Court of Washington also considered and rejected the contention that the procedures employed by the Law School in selecting applicants to be admitted were arbitrary and capricious. (82 Wn.2d 11, Jur. St. A-28.)

Unfortunately, one dissenting opinion in the Washington Supreme Court, by Chief Justice Hale and concurred in by Justice Hunter, unfairly conveys a general impression of inconsistency, irrationality and capriciousness in the conduct of the process of selection of applicants to be admitted. (82 Wn.2d 11, 45, Jur. St. A-36.) That dissenting opinion, however, is pervaded with inaccurate and distorted factual assertions.

The purpose of this appendix is to identify and correct these errors of fact which are many in number and varied in character. Analytically, however, three main points can be identified which have important significance and which are demonstrably false. Other errors of fact are either of lesser import or are subsidiary to one of these following principal points:

1. That comments written on applicant file jacket covers by individual committee members reflected views or actions of the Admissions Committee.

2. That in a number of instances applicants were admitted by action of the deans contrary to or in the absence of decision by the Admissions Committee.

3. That the decision making by the Admissions Committee was unsystematic and inconsistent in that it did not apply the policies which it purported to follow.

I. *The Comments Written On Applicant File Jacket Covers Did Not Represent The Determinations Of The Committee.*

The seminal factual error in Chief Justice Hale's dissenting opinion is the treatment of various comments or notations written on applicant file jackets by individual committee members as constituting summaries of committee determinations or findings. To a large extent, this distorted significance accorded to the jacket comments is the "evidence" relied upon in the opinion to establish the other erroneous factual conclusions which permeate it.

The front of jackets used for applicants' files were imprinted with a form like that on the opposite page. (See Exh. 43 being

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Three justices joined in a concurring opinion suggesting the desirability of publishing a more complete statement of the standards for admission. (82 Wn.2d 11, 44-45, Jr. St. A-35.)

A-5

LSDAS	EVAL	B	C	R		

APPLICANT
Accepted
Declined
Waiting List

FILE CLOSED
No response to offer
Application incomplete

ADMISSIONS COUNCIL
Accept
Reject
Waiting List

Quarter and Year
Expects degree
From
Major

NOTES	

PFYA Points

Prelim Jr-Sr
PO
LSAT
Writing
Background

+ 51.3

Predicted PYA

TRANSFER
Law School
Class Standing
First Year Average

an Affidavit of Richard O. Kummert in Support of Defendants' Motion to Quash Subpoenaes Duces Tecum and for Order Limiting Scope of Examination to which a copy of this form was attached. The affidavit is in evidence. St. 338, 364. See also Exhs. 2, 15-42. A very few files opened in earlier years when the person first applied were in plain jackets. See Exhs. 22 and 32.)

The relevant information called for on the right hand portion of the jacket covers was filled in by a staff person in preparing the files for committee review. (St. 254, 272.) These data included the applicant's name, degrees, prior college, major, junior-senior undergraduate grade point average, postgraduate average if any, LSAT scores, and the computation of the PFYA. (See Exhs. 15-21, 23-31, 33-42; St. 288-289.)

It will be noted that in the upper left hand portion of the jacket there are spaces in which to reflect actions by the "Admissions Council" which was the term then employed to refer to the Committee on Admissions and Readmissions (*i.e.*, "Accept," "Reject," or "Waiting List"), responses by the applicant (*i.e.*, "Accepted," "Declined," or "Waiting List"), and reasons for administrative file closure if that occurred ("No response to offer" or "Application Incomplete"). Actions with respect to the file of any of these varieties were indicated by stamping or occasionally writing the date of action in the appropriate printed space.

In addition, there was an area imprinted with lines and headed "Notes."

When the large number of midrange files, and others to be reviewed with them pursuant to prior screening, were ready for committee review they were distributed randomly by the chairman among individual committee members for initial review and report to the full committee. (S. App. 30-31; St. 253-254, 343-345.) The mechanism by which the committee deliberated on applicant files involved a prior review of the file by a committee member, a report by that member to the full committee, discussion by the full committee, and finally a committee vote on the disposition of the application. (St. 255, 257, 290-291, 316, 347-348, 359-360.)

In their initial reading, committee members frequently made comments or notations on the file jacket of an applicant to

assist in their job of reporting to the full committee. (St. 253.) Since there was debate on each applicant, a particular member's own recommendation to the committee might not always be followed. (St. 314.) Hence, the member's notes on the file jacket might not be consistent with the official committee action noted also on the file jacket. The committee decisions, however, were shown by date notation in the appropriate space at the top of the jacket cover.[3]

In his dissenting opinion, Chief Justice Hale repeatedly refers to the comments or notations by individual committee members as if they reflected committee views or actions. Thus, comments on files are characterized variously as follows:

> "The admission committee notes in his file read as follows . . . ." (82 Wn.2d 11, 57, Jur. St. A-47.)
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> ". . . despite the remarks of the admissions committee that he be rejected." (82 Wn.2d 11, 58, Jur. St. A-48.)
>
> ". . . despite the admission committee's remarks set forth in his file . . . ." (82 Wn.2d 11, 58, Jur. St. A-48.)
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> "The remarks entered by the admissions council in her file note that she was 'Divorced with five kids. Could make it if her personal situation could be worked out.' It added, 'Excellent recommendations; sound record,' and upon these conclusions recommended admission to the law school." (82 Wn.2d 11, 58, Jur. St. A-48.)

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3. During its major review of the large pool of midrange applicants during May, the committee as to each applicant decided to either admit, deny, or offer a waiting list position to the applicant. (S. App. 31-32.) At that time, as a rather large waiting list was then thought to be necessary (St. 333-335.), the committee also ranked those on the waiting list in four alphabeticaly labeled groups, sometimes referred to as the "quartiles" of the waiting list though the four groups were not of equal size. (Finding XVII, S. App. 50-51; St. 348.) The four groups were denominated, from highest to lowest, as "B," "C," "D," and "E." At a meeting on July 21, 1971, the committee decided that the attrition to that time among applicants who had been offered admission was such as to warrant some further offers of admission from the waiting list and that it would not be necessary to continue the entire waiting list group. (St. 354, 381.) Hence, it decided to offer admission to 25 persons from the highest or "B" group, to deny the persons in the lowest two groups, "D" and "E," and to consolidate the balance into a single final waiting list for future action. (Findings XVII and XVIII, S. App. 50-51; S. App. 33; St. 354.) Offers to admit from that final waiting list were made in mid-September. (St. 367-368, 381.)

"... the determining factor for admission here as revealed in the file is the remark on the admissions council list...." (82 Wn.2d 11, 59, Jur. St. A-48.)

Each of these is a reference to comments written on a file jacket by an individual committee member. These were not statements of committee view or action; indeed, one is a reference to a comment made in a prior year when the individual first applied and is so dated. (Exh. 26, sheet 2; see *infra* pages A-37-38.)

This mischaracterization of the jacket comments might be a trivial error were it not for the fact that Chief Justice Hale relies upon the import which he accords to them to show either that the committee based its decisions upon aberrant considerations or that the deans admitted individuals contrary to the committee decisions.

The true character of the notations on the file jacket as reminder observations written by a single committee member assigned to review the file and open committee discussion of it is manifest not only from an analysis of the files themselves but from various statements in the trial transcript. (St. 253, 267, 308, 347, 359.)

II. *Admission Decisions Were Made Only By The Committee, Not By The Deans.*

In his discussion of the decisions made with respect to four individual applicants, Chief Justice Hale states or implies that the deans admitted the applicants contrary to or in the absence of recommendations by the Admissions Committee.

This is not true, however. The deans did not make admission decisions apart from the committee process. The four applicants adverted to in this vein in the dissenting opinion are those whose files were Exhibits 19, 25, 26, and 38. In each case, the committee action is disclosed by the exhibit itself and the decision communicated to the applicant was in accordance with the committee action.

An analysis follows of each of the four applicant files as to which Chief Justice Hale asserts or implies that the deans admitted the applicants other than as recommended by the committee. The files are identifiable by comparing the numeri-

cal indicators mentioned in the statements in the opinion with the files in evidence.

A. The applicant whose file is Exhibit 38 is the person referred to in the following statement by Chief Justice Hale:

> One young woman with a junior-senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council. (82 Wn.2d 11, 58, Jur. St. A-47.)

The file shows that this applicant was placed on the waiting list by the committee on May 13, 1971, and was so advised by letter dated May 21, 1971. (Exh. 38, sheets 2, 8.) She was admitted from the waiting list by the committee on September 13, 1971,[4] and was so advised by letter dated September 14, 1971. (Exh. 38, sheets 2, 3.)

B. The applicant whose file is Exhibit 26 is the person referred to in the following statement in the dissenting opinion by Chief Justice Hale:

> An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475, was admitted by letter from the associate dean dated July 29, 1971, despite the remarks of the admissions committee that he be rejected. (82 Wn.2d 11, 58, Jur. St. A-48.)

The file discloses that this applicant, a minority person, was placed on the waiting list by the committee on May 26, 1971, and admitted from the waiting list by the committee on July 21, 1971. (Exh. 26, sheets 3, 6, 9.) The "remarks of the admission committee that he be rejected" to which Chief Justice Hale adverts are comments written on the file by a committee member the year before when the applicant first applied and was rejected. The comment is dated "4/26/70." (Exh. 26, sheets 3, 27, 19.)

C. The applicant whose file is Exhibit 25 is the person referred to in the following statement in the dissenting opinion by Chief Justice Hale:

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4. Professor Kummert described the process of admitting the last group to fill out the vacancies remaining in the class as of the time of trial in mid-September 1971. (St. 367-368.)

> Another applicant with a junior-senior GPA of 3.32, an LSAT of 759, and a writing score of 60 was admitted by letter of July 23, 1971, from the associate dean of the law school despite the admissions committee's remarks set forth in his file that his "recommendations are equivocal and his academic career unimpressive." (82 Wn.2d 11, 58, Jur. St. A-48.)

The file shows that the committee placed the applicant on the waiting list on May 10, 1971, and he was so advised by letter dated May 21, 1971. He was admitted from the waiting list by the committee on July 21, 1971, and so advised by letter dated July 23, 1971. (Exh. 25, sheets 2, 5, 8.)

D. The applicant whose file is Exhibit 19 was the subject of the following statement in the dissenting opinion by Chief Justice Hale:

> An applicant with a GPA of 3.55 was notified of his acceptance by the law school by letter of May 21, 1971, from the associate dean after achieving an LSAT of 625 and a writing score of 61. For some reason or other, the admissions committee recommended against outright admission but that he be placed on the waiting list. *Despite this, however, the applicant was categorically admitted.* (82 Wn.2d 11, 59, Jur. St. A-49.) (Emphasis added.)

We can identify no evidentiary basis from which one could derive, even by misinterpretation, the conclusion stated in the emphasized language.

The applicant was placed on the waiting list by action of the committee on May 12, 1971, and he was so advised by letter from Associate Dean Hunt dated May 21, 1971. (Exh. 19, sheets 2, 6.) Actually, he never was thereafter admitted for when the Admissions Secretary attempted to contact the persons remaining on the waiting list in September, she was only able to reach the applicant's mother who advised her that he had enrolled elsewhere and agreed that he should be withdrawn from the waiting list. (Exh. 19, sheet 3.)

The suggestion that admission decisions were made by the deans apart from the committee process appears only in the dissenting opinion by Chief Justice Hale. It has no basis in the record of the trial, the findings by the Superior Court, or in the argument of the parties.

Associate Dean Robert S. Hunt was a member of the committee and acted as its administrative arm in communicating its decisions to applicants. (St. 329.) The admissions function had been delegated to the Committee on Admissions and Readmissions and the Dean had little involvement in the process. (St. 59-62.)

III. *The Committee Decision Making Process Was Systematic And Consistent.*

Chief Justice Hale's dissenting opinion conveys the impression in a variety of ways that the selection process by the committee was capricious in that it conducted its function in an unsystematic fashion or failed to apply with reasonable consistency the policy guidelines which it purported to be following. Whether or not this occurred is largely a question of fact. It essentially is the issue posed by Chief Justice Hale's assertion that:

> By all standards and requirements of the admission policies openly announced by the law school, he [Mr. DeFunis] should have been admitted.
>
> The way things worked out, however, the law school failed to apply even its own vague, loose and whimsical admissions standards. (82 Wn.2d 11, 48-49, Jur. St. A-39.)

It is not true that the committee decision making was unsystematic or inconsistent in the application of the policies which it undertook to follow. Given the policies and evaluative criteria which it purported to follow, the committee in fact proceeded carefully and systematically and any decisions with which one might disagree were well within the parameters of rational variations to be expected in any process of discretionary decision making.

In the following, we have attempted to identify, analyze and correct the factual errors and distortions relied upon by the dissenting opinion to support its assertion to the contrary.

A. The dissenting opinion exaggerates the extent to which factors other than predicted academic potential operated in the selection of applicants to be admitted.

It is admitted that the committee considered factors other than potential for academic success in law school as predicted by the numerical indicators of the undergraduate grade point

averages and the LSAT scores combined in the PFYA index. Thus, in the application of the military readmission rule[5] and in the carrying out of the minority admissions policy, the committee admitted a number of persons with numerical indicators of academic potential lower than those of other applicants who were denied admission.

Apart from these policies, however, the committee relied upon other evidences in addition to the numerical indicators in order to make a more refined judgment as to academic potential, and gave consideration to salient evidence that a particular candidate might be expected to make an unusual contribution to the educational environment of the school and to the profession. But these factors were accorded only limited and secondary significance in the selection of applicants for admission. (St. 360-361.) The dissenting opinion exaggerates the significance accorded these other factors in the selection process. It does this, first by misconstruing the evidence as to the number of applicants admitted with numerical indicators of academic potential lower than Mr. DeFunis' and, second, by attaching unwarranted significance to the comments written on file jackets by individual committee members.

1. *Relatively few applicants were admitted with PFYA indices lower than that of Mr. DeFunis.*

The dissenting opinion ignores the committee's primary reliance on the combined PFYA index rather than on either the undergraduate grade average or the LSAT scores alone. In this connection, Chief Justice Hale emphasizes the number of applicants who were admitted with lower grade averages than Mr. DeFunis rather than the relatively few who were admitted with lower PFYAs. Also, in his discussion of a handful of individual files, he avoids systematic comparison of them by

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5. The military readmission policy accorded automatic readmission to the Law School to applicants who had been admitted in previous years and either had been unable to attend by reason of involuntary entry into the military or alternative service or had enrolled but been forced to withdraw during the first year because of such reasons. (S. App. 31; St. 263, 349-350, 410-411.) Due to the escalation in the number and quality of the academic credentials of the persons applying to the Law School in recent years, some of the individuals readmitted pursuant to this policy did not have credentials which would have led to their admission in 1971 under competitive consideration. (St. 335-337; Finding XXVI, S. App. 53-54.)

PFYA position and gives an impression of random treatment. (See 82 Wn.2d 11, 57-59, Jur. St. A-48-49. At a later point in this appendix, *infra* page A-23, these illustrative files are compared by PFYA rank. Interestingly, the actual results of the decisional process even as exemplified by these few selected files shows a pattern following the PFYA indications to a remarkable extent.) Chief Justice Hale's summary of the overall results of the admissions process is as follows from 82 Wn.2d 11, 49, Jur. St. A-39-40:

> Of the approximately 155 enrolled in the entering law class in the fall of 1971, 29 had higher PFYAs than Mr. DeFunis, but there were 74, including minority students, with lower PFYAs. Excluding Asians, 18 of the 36 minority students with lower PFYAs than Mr. DeFunis actually did enroll; the other 18 notified of their admission, also with lower PFYAs than plaintiff, for reasons not discernible in the record did not enroll.
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> Altogether, 275 applicants were given formal notice of acceptance into the class entering in the fall of 1971 and another 55 were put on a waiting list making a total of 330 students who were formally accepted or notified that they probably would be. The reason for giving notice of acceptance to 275 for a class which was limited to 155 is that usually many applicants apply to several schools; others, for one reason or another, are unable or disinclined to enroll. Plaintiff Marc [sic] DeFunis, Jr., was neither among the 275 notified of acceptance nor among those added to the waiting list of 55.
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> The discriminatory action in refusing his admission becomes even more glaring when an overall view is taken of the admission practices. Of the 275 students who were explicitly told they had been accepted to the entering 1971 fall class, 180 had lower junior-senior grade point averages than Plaintiff DeFunis and only 95 had higher. Of 330 accepted for admission, which included those notified of admission and the additional 55 placed on a waiting list, 224 had lower junior-senior grade point averages and only 106 had a better average—and this without allowing for the 9 hours of A in Latin he had received in his junior year. Among the 275 admitted, 44 were minority, *i.e.*, Afro-American, Philippine American, Chicano or

> American Indian, and of these 44 minority admitted, only 6 had higher academic qualifications than Mr. DeFunis and 38 had lower qualifiications.

The number of applicants referred to in the first quoted paragraph with PFYAs below Mr. DeFunis are erroneously related to the total of persons *enrolled* in the class rather than to the numbers *offered admission*. As the enrolled class was a much smaller number than the total of persons to whom admission was offered, this error tends to inflate the significance of the number with PFYAs below Mr. DeFunis.[6] The juxtaposition of this erroneous statement and the figures in the third paragraph which emphasize grade point average comparisons and ignore the significance of the LSAT scores in the PFYA formulation, serves to obscure the fact that the number of instances in which admission resulted from other than a pure combination of high grades and high LSAT scores was relatively small. (The figures involved are taken from Findings XVI-XX, S. App. 50-52.)

A far more complete and accurate statement on this point is the one in the majority opinion at 82 Wn.2d 11, 22, Jur. St. A-13:

> Because of the judgmental factors in the admissions process, as outlined, the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of these were minority applicants, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitations on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority

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6. Apart from its tendency to inflate the relative significance of the figures, the first sentence in the above quotation from the dissenting opinion which reads "Of the approximately 155 enrolled in the entering law class in the fall of 1971, 29 had higher PFYAs than Mr. DeFunis, but there were 74, including minority students, with lower PFYAs" is a garbled statement. Obviously, in an enrolled class of 155, there could not be 29 persons with higher PFYAs than Mr. DeFunis and 74 with lower PFYAs as those figures do not add up to 155. The facts as found by the trial court were that 29 applicants with higher PFYAs than Mr. DeFunis were denied admission and 74 with lower PFYAs, including 36 minority group applicants, were offered admission. (Finding XVI, S. App. 50.)

group students invited 18 actually enrolled in the first-year class.

The reference to 9 hours of A in Latin courses which were not taken into account is based on a finding but deserves passing explanation. These credits were earned in summer session between Mr. DeFunis' sophomore and junior years. (Exh. 1.) Committee policy was to use junior-senior academic year grades for the PFYA computation. (Finding XIV, S. App 50; S. App. 23.) In the case of an applicant who had completed undergraduate work and received a degree, this was taken as the last six quarters of the undergraduate academic credits. (St. 408-409.)

2. *Comments written on the file jackets by individual committee members do not accurately reflect the bases for the committee's decisions.*

Chief Justice Hale selectively emphasizes as evidence of the bases for committee decisions certain of the remarks written on applicant file jackets. As pointed out above these were not committee findings. Moreover, if one understands that these notations were merely self-reminders by individual committee members who read the files of salient points which they wished to bring to the attention of the whole committee to initiate discussion on the applicant and, further, that the academic indicator information (*i.e.*, the grade averages, LSAT scores, and PFYA) otherwise appeared on the front of the jacket, the limited significance of these comments is obvious. A good illustration of the fallacy involved in attaching determinative significance to these comments is the following excerpt:

> Another applicant admitted with a junior-senior grade point average of 3.56 had an LSAT of 625. Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: "Enthusiastic recommendation. Abundant community action projects." (82 Wn.2d 11, 59, Jur. St. A-28.)

To characterize the individual committee member's preliminary file comments rather than the high academic indicators as "the determining factor for admission" is a curiously speculative conclusion.

B. Applicants with PFYA indices within the range from which selections for admission were being made were not summarily denied by decision of individual members of the committee.

Chief Justice Hale asserts that individual members of the committee, including the student members, had the power to categorically reject substantial numbers of qualified applicants. He states at 82 Wn.2d 11, 54-55, Jur. St. A-44:

> Each member of the committee, including student members, was given approximately 70 files upon which to make recommendation for admission or rejection, with instructions that only about 10 were to be approved for admission and the remaining 60 rejected. Thus, of over 1500 files to be examined, 490 files were distributed among the committee members. Each member would arrive at what was determined to be a cutoff point below which the files would be summarily rejected, and in the usual course of events those files received no further consideration.
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> Of the approximately 70 files given to each member, both student and faculty accordingly would return to the whole committee a recommendation of 10 for admission. Since the 70 files per committee member represented only 490 of some 1500 plus, Mrs. Zorn testified she assumed that several hundred applicants had been summarily rejected before distribution of the 70 files to each member, and quite possibly some had been summarily admitted. In general, it is a fair summary of the record, I think, that of the approximately 70 files distributed to each committee member, an applicant neither included in the 10 recommended nor in some 20 more carried as secondary possibilities had little or no chance for admission.
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> Thus, some 40 student applicants were categorically rejected, another 20 given only secondary or uncertain chances, and 10 applicants put in a categorically positive position for admission upon nothing more than the recommendation of a first- or second-year law student. Mrs. Zorn testified that of the 40 files marked by her for rejection, she had no subsequent knowledge or further contact.

Chief Justice Hale's description of the process is critically in

error in the assertion that applicants were categorically rejected upon nothing more than the recommendation of a student member of the committee. In its consideration of the mid-range pool of applicants, the committee took up all files for review in descending order of PFYA rank. Hence, committee consideration of an applicant was not hinged upon the recommendation of the initial reviewer. (St. 346-347.) Professor Kummert's statement is as follows:

> The Committee then determined that, as an overall check upon the process, all files would be presented to the Committee in order of their predicted first year average, irrespective of the recommendations of the Committee member reviewing the file. It was felt that his procedure would result in the fairest comparisons that could be made between prospective candidates, while at the same time offering encouragement to the Committee member reviewing the file to offer complete justification as to why his recommendation regarding the applicant might have been different than the applicant's relative ranking based only on the predicted first year average would suggest. As a result of this process, on May 12, 1971 the Committe after having considered at meetings on May 10, May 11, and May 12 to that point 168 applications with predicted first year averages higher than Mr. DeFunis' average, which number included a number of applications with predicted averages quite close to the predicted first year average of Mr. DeFunis, reviewed the application of Mr. DeFunis and placed him in the lowest quartile of its waiting list. The Committee's meetings concerning this group of files continued on May 13, 14 and 17 during which time the Committee reviewed files in order of predicted first year average down through the lowest ranked applicant on such scale recommended by a Committee member for a waiting list position. (S. App. 32; St. 346-347.)

Mrs. Zorn's testimony, upon which Chief Justice Hale apparently relied, might warrant some inferences different from Professor Kummert's description but the total dialogue with her is uncertain and susceptible to various interpretations. (St. 253-259.)

At least one of the applicants specifically adverted to by Chief Justice Hale in his discussion of illustrative cases was a

situation where Mrs. Zorn recommended rejection and the committee decision was to place the person on the waiting list. This fact alone is inconsistent with the idea that categorical rejection occurred by unilateral action of the individual committee member. (Exh. 18.)

C. The discussion in the dissenting opinion of illustrative individual applicants does not accurately portray the decisional process.

In light of Chief Justice Hale's extensive reliance on the technique of proof by illustrative example, an analysis of the sample of applicant files to which he resorted for this purpose is illuminating. It will be recalled that 1601 completed application files were reviewed and acted upon. Of these, 330 either were offered admission or were on the final waiting list.

After having gained access to the files by discovery, one of the petitioners' attorneys reviewed all or a large number of them and selected those which they subpoenaed and sought to use at the time of trial. (St. 7, 322.) The only applicant files introduced were those offered by petitioners, presumably being those where petitioners' attorney thought there was "something wrong." (St. 8, 322.) In this fashion, 28 separate applicant files were identified in the record. (Exhs. 2, 15-42.)[7]

One given to judicious caution in the legal determination of facts would scarcely regard a review of a sample selected in this fashion as constituting what Chief Justice Hale describes as "A random examination of the records of various students accepted by the law school in the entering classes for which Mr. DeFunis had applied . . . ." 82 Wn.2d 11, 57, Jur. St. A-47.)

Of the 28 applicants whose files were available to him, Chief Justice Hale specifically adverts to 12, including that of Mr. DeFunis, at one point or another in the course of his opinion. (Exhs. 15-19, 21, 22, 24-26, 38.) In addition to Mr. DeFunis,

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7. The dissenting opinion incorrectly states that "some 42 admission files were placed in evidence." (82 Wn.2d 11, 59, Jur. St. A-49.) Exhibits 1-14 were not applicant files except for that of Mr. DeFunis which was entered in two portions as Exhibit 2 and Exhibit 27. (St. 50, 320.)

Actually, it does not appear from the record that most of these files ever were admitted in evidence. All were marked for identification but as far as we can ascertain, only four, in addition to Mr. DeFunis', were admitted. (Exhs. 15, 16, 17 and 18, all admitted at St. 288.)

who of course is discussed throughout the opinion, two of these 12 are referred to twice at different points in the opinion. (Exhs. 18, 24.) In one of these two cases, the opinion does not mention that different aspects of the same file are relied upon at the two separate places in the discussion where it is used to illustrate different points. (Exh. 18.) Thus one would hardly guess that these two following comments, three pages apart in the opinion, in fact refer to the same applicant:

> She recommended, however, against the admission of another student with a 3.9 junior-senior grade average because she did not think that his area of study, the field of finance, adequately significant. Finance, as she put it, was a program without rigor. She was apparently unaware of the rigorous nature of courses in accountancy, statistics, economics and banking as taught at the University of Washington. (82 Wn.2d 11, 56, Jur. St. A-46.)
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> * * *
>
> Another applicant earned a remarkably high junior-senior GPA of 3.90 and scored 599 in the LSAT, but achieved a writing score of only 46. He was notified of his acceptance by letter September 14, 1971, by the dean of the law school. There is apparently very slight correlation in many cases among the GPA, the LSAT, and the writing scores. (82 Wn.2d 11, 59, Jur. St. A-48-49.)

Of these 12 applicants discussed by Chief Justice Hale, three were considered by the committee as minority persons and a fourth was admitted in a prior year and determined to be entitled to automatic readmission under the military readmission rule. (Exhs. 21, 22, 24, 26; St. 349-353.) However, only one of these minority applicants is clearly so identified in the discussion. (Exh. 21, referred to in 82 Wn.2d 11, 58, Jur. St. A-48.) Another of these minority applicants, referred to by Chief Justice Hale at two separate points, can be so identified from the opinion only by inference. (Exh. 24, referred to in 82 Wn.2d 11, 57 and 58, Jur. St. A-46-47, A-48.)

Another minority applicant and the military readmission applicant are not so identified at all. (Exh. 26, referred to in 82 Wn.2d 11, 58, Jur. St. A-48; Exh. 22, referred to in 82 Wn.2d 11, 56, Jur. St. A-46.) The discussion of the numerical academic indicators of these applicants, considered by the

committee pursuant to special policies of admission, along with those of other regular applicants has the effect of accentuating an appearance of inexplicable incongruity in the treatment of applicants by the committee.

Thus the dissenting opinion adverts to only eight applicants admitted by the committee on the basis of parallel comparison rather than under one of the two bases for special admission consideration which the committee recognized.

Two other observations about the nature of this "sample" are in order. The first is that two of the files were of applicants with PFYAs over 77 but were among the relatively few of such high ranking applicants as to whom some substantial concerns arising from initial review led the committee to not admit the individuals earlier but rather to defer the files for consideration along with the pool of applicants in the PFYA 74.5-76.99 range. (Exhs. 15, 25; S. App. 30-31; St. 340, 343.) Almost by definition, therefore, these were exceptional cases and not representative of the applicants generally in the over 77 PFYA range.

The second observation is that six of the eight files are ones which had been assigned to Mrs. Zorn for initial review and reporting to the committee. We can only guess at the reasons which led to the concentration in the dissenting opinion on these files initially reviewed by Mrs. Zorn. Probably, there were several reasons. Chief Justice Hale appears to have been suspicious of the student members of the committee. Of the student members, Mrs. Zorn was the one most extensively examined and cross-examined during the trial. Most important, however, we suspect, was the fact that Mrs. Zorn, more than other committee members, seems to have pursued a consistent practice of writing her comments and preliminary recommendations on the file jackets and initialing them. Of the files identified in the record, the ones reviewed by Mrs. Zorn constituted the largest single group with comments and recommendations noted on the jackets and identifiably traceable to a single committee member. Given Chief Justice Hale's misconstruction of the jacket comments of individual reviewers as if they were expressions of the committee's decisions, these files initially reviewed by Mrs. Zorn yielded the most fertile opportunities for the kind of discussion of illustrative cases upon which the opinion relies to disparage the integrity of the admissions process.

An illuminating example both of Chief Justice Hale's attitude toward the student members of the committee and of his failure to state facts in fair consistency with the evidence in the record is his description of Mrs. Zorn's residency status as follows:[8]

> For example, Tama Zorn, one of the student members who testified, said that she had beecome a member [of the committee] during her first year in law school. Although actually a resident of Washington, D.C., she had been accorded what she described as resident status for tuition purposes on entering law school. (82 Wn.2d 11, 53, Jur. St. A-43.)

The second sentence should be compared with the following dialogue between petitioners' attorney and Mrs. Zorn in the transcript at St. 248-249:

Q (By Mr. Diamond) How long have you resided in Seattle?
A Two years.
Q You reside here with your husband?
A That's right.
Q What does he do?
A He is on the University faculty, at the hospital.
Q In what field?
A He is in ophthalmology research.
Q Before coming to the University of Washington, Mrs. Zorn, were you a resident of the State of Washington?
A Before entering law school?
Q Before coming to the University of Washington.
A Yes.
Q How long had you resided here?
A One year.
Q One year before coming here?
A That's right.

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8. The point, which would otherwise appear to be irrelevant and minor, had significance in the total pattern of the dissenting opinion because of Chief Justice Hale's emphatic criticism of the Law School for disregarding what he viewed as the natural preferential rights of residents of the State. He described the failure of the Law School to accord an admissions preference to residents of the State as an "invidious form of discrimination" against them. (See 82 Wn.2d 11, 46-47, Jur. St. A-37-38.)

Q You are going to school now?

A That's right.

Q What school are you going to?

A I am going to the University of Washington School of Law.

Q How far along are you in law school?

A This will be my second year.

Q When you first came to the law school, did you come as a non-resident student?

A No, I came as a resident, partially due to the courtesy extended to faculty wives and children of faculty. They are given residency status for the purpose of tuition, but I also would have qualified for residency after having lived here for one year.

Q Where was your home before you came to Washington?

A One year prior to that, we lived in Washington, D.C.

It is clear from her testimony that Mrs. Zorn was a resident of the State of Washington when she entered Law School. Certainly, she was not a resident of the District of Columbia.

The handful of individual cases discussed in the dissenting opinion cannot be viewed as fairly illustrative of the committee's decision making. They are not a representative sample by any stretch of the imagination. Rather, the files of these few applicants appear to have been deliberately selected and the discussion of them carefully tailored to disparage the rationality and consistency of the admissions process.

But the significant fact is that when the files of even these eight applicants (including Mr. DeFunis but excluding the four admitted under the military rule or as minority candidates) and the decisions made with respect to them are analyzed fully and compared fairly, they actually tend to prove the consistency and integrity of the process and to affirmatively disprove the impression of capriciousness conveyed by the dissenting opinion.

The following table ranks these eight applicants by descending PFYA order and shows the recommendation of the initial reviewer and the action of the committee:

Applicant File	*PFYA*	*Initial Reviewer and Comments*	*Committee Actions*
Exh. 15	78.35	Zorn—Defer; Admit	Admitted—May 10
Exh. 25	77.65	Zorn—Wait List "B"	Wait List "B"—May 10; Admitted—July 21
Exh. 16	76.79	Zorn—Wait List "B"	Wait List "B"—May 11; Admitted—July 21
Exh. 17	76.53	Zorn—Wait List	Wait List "C"—May 12; Admitted—Sept. 8
Exh. 18	76.47	Zorn—Deny	Wait List "C"—May 12; Admitted—Sept. 14
Exh. 19	76.36	Zorn—Wait List	Wait List "C"—May 12; Withdrew—Sept. 10[9]
Exhs. 2 & 27 (DeFunis)	76.23	Various—No conclusion expressed	Wait List "E"—May 12; Denied—July 21
Exh. 38	75.96	No comments	Wait List "C"—May 12; Admitted—Sept. 13

Two observations with respect to this array should be emphasized. First, in one of the cases the committee action was different from Mrs. Zorn's recommendation. (Exh. 18.)

Second, except for Mr. DeFunis and the applicant whose file was Exhibit 38, the committee's decisions with respect to the applicants are consistent with the PFYA rank order.

Analysis Of Individual Applicant Files Identified In The Record.

The following portion of this appendix consists of a specific and detailed analysis of the files of each of the applicants (other than Mr. DeFunis) who are mentioned in Chief Justice Hale's dissenting opinion related to the statement in the opinion concerning the applicant. We have identified the individuals by matching the LSAT scores, grade point averages, and PFYA scores with those of the files in evidence. To preserve at least some measure of anonymity, we have omitted reference to the applicants by name.

In the last analysis, if the Court is concerned with the issue, the only way to evaluate whether Chief Justice Hale's terse summaries and characterizations of the decisions made in the

9. An attempt was made to contact applicant by telephone on September 10, 1971, but only his mother could be reached and she indicated that he had already enrolled at another law school and agreed to withdraw his name from the wait list. Hence, technically, he was not ever offered admission. (Exh. 19, sheets 2, 3.) Otherwise, he clearly would have been offered admission on that date.

individual cases he cites are fair is to analyze each of the files fully.

We submit that if these 11 cases are the best evidence that can be produced to demonstrate the capriciousness of the committee's decision making, then the process stands up well under cutting scrutiny. In fact, when the files are analyzed fully and fairly, the decisions made were reasonable and fair.

Exhibit 15

Chief Justice Hale's statement at 82 Wn.2d 11, 57, Jur. St. A-47:

> One admitted applicant showed an almost vertical climb. He had a junior-senior grade point average of 3.64, but an overall grade point average of 2.85. The admission committee notes in his file read as follows: "Overall GPA 2.85. strange recommend. 'arrogant, conceited' but apparently bright . . . [not readable] Take a chance on his screwy personality & admit." His PFYA was 78.35 with a writing score of 71.

The facts:

LSAT 702 Writing Score 71 Jr.-Sr. GPA 3.64 PFYA 78.35 (St. 288, Exh. 15, sheets 2, 26.)

The applicant was admitted by the committee on May 10, 1971, and was so advised by letter dated May 19, 1971. (Exh. 15, sheets 2, 6.) He declined admission to enter active duty in the military due to financial stress. (Exh. 15, sheet 5.)

The "[not readable]" language says "Recommend defer" and is probably of an earlier origin than the comments following. (St. 271.) The statements are correct; that is, the recommendations are unusual and do suggest personal peculiarities. (Exh. 15, sheets 20-22.)

It is not clear what point Chief Justice Hale is making concerning this applicant. The applicant's PFYA was in the very high range but the file had been deferred on Mrs. Zorn's recommendation for consideration in the large pool to be considered by the committee process commencing on May 10. (St. 271, 340.) When it was then reconsidered, Mrs. Zorn recommended admission. (St. 271, 273.) That recommendation was adopted by the committee and the applicant was offered admission but declined in order to voluntarily enter active duty in the armed services for financial reasons. (St. 272-273.)

Exhibit 16

Chief Justice Hale's statement at 82 Wn.2d 11, 55-56, Jur. St. A-45-46:

> There is also a curious aura of civil, political or community "activism," as it is sometimes called, surrounding the recommendations for admission or rejection. One student applicant recommended by Mrs. Zorn had an LSAT of 562, substantially lower than the average of Mr. DeFunis, but was recommended for the waiting list because of being very active on campus and in his community. The activity which impressed her the most was that he was a founding member of Isla Vista Branch of the American Civil Liberties Union and president of its student chapter at the University of California, Santa Barbara. He had participated in the John Tunney for Senate campaign in California and in the operation of a student owned and operated radio station in Santa Barbara. Also, the applicant had been a campus news reporter and a member of several other campus organizations. Mrs. Zorn had concluded that these activities, despite the low LSAT, established sound basis for admission to the law school.

The facts:

LSAT 562 Writing Score 71 Jr.-Sr. GPA 3.83 PFYA 76.79 (St. 288, Exh. 16, sheets 2, 24.)

The committee placed the applicant on the "B" waiting list on May 11, 1971, and he was so advised on May 21, 1971. (Exh. 16, sheets 2, 10.) He was admitted from the waiting list by the committee on July 21, 1971, and was so advised by letter dated July 23. (Exh. 16, sheets 2, 7.) Applicant declined the offer of admission. (Exh. 16, sheets 2, 3.)

This file illustrates the manipulation of the facts by the dissenting opinion by shifting between emphasis on the grades, the LSAT and the PFYA. Here the LSAT was on the low side but the grades were very high and the PFYA was on the high side of the mid-range group, a 76.79. Chief Justice Hale mentions only the low LSAT. Indeed, in this respect the disregard of the obvious comparison with Mr. DeFunis himself is interesting. Mr. DeFunis was also on the low side as to the LSAT but had high grades, the differential being somewhat less and the operation of the formula such that Mr. DeFunis had a

lower PFYA. Thus, Mr. DeFunis had a 582 LSAT, a 3.71 Jr.-Sr. GPA and a 76.23 PFYA.

Chief Justice Hale fails to mention that Mrs. Zorn's recommendation and the committee decision were to place the applicant in the high waiting list range, rather than to admit outright, and he was subsequently admitted from the waiting list.

Finally, the inference which Chief Justice Hale conveys that Mrs. Zorn was primarily influenced by the applicant's activities rather than his academic potential is questionable. All but one of the rather extensive comments written on the file jacket by Mrs. Zorn relate to the prediction of academic potential. The comments are as follows:

> "LSAT represents two times at bat with no improvement—Good grades & high writing score—recommend. exceptional—waiting list—TZ"
>
> "Poli Sci prof says he was the outstanding student in an upper division seminar—very active on campus and in the community. We don't have all his senior grades but his junior year was a straight 4.0 & includes several poli sci courses as well as a 'senior seminar' in poli sci. I'd go with the GPA on this one & accept him."

(Exh. 16, sheet 2.)

In response to questioning by petitioner's counsel, Mrs. Zorn recited the activities which led her to make the comment that the individual was "very active on campus and in the community" and the observation seems to have been well justified. (St. 282-283.) This applicant was in the middle range where other factors were considered in making selections. Mrs. Zorn legitimately considered the evidences of substantial community activity as a favorable factor. Her testimony makes it clear that she was interested in the fact of demonstrated commitment to community centered efforts and not in the nature or political orientation of the activities. (St. 283-285.)

Exhibit 17

Chief Justice Hale's statement at 82 Wn.2d 11, 59, Jur. St. A-48:

> Another applicant admitted with a junior-senior grade point average of 3.56 had an LSAT of 625. Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: "Enthusiastic recommendation. Abundant community action projects."

The facts:

LSAT 625 Writing Score 64 Jr.-Sr. GPA 3.56 PFYA 76.53 (St. 288, Exh. 17, sheets 2, 22, 26.)

The committee placed applicant on the "C" waiting list on May 12, 1971, and he was so advised by letter dated May 21, 1971. (Exh. 17, sheets 2, 7.) He was admitted from the waiting list September 8, 1971, and so advised by telephone September 10, 1971, but declined. (Exh. 17, sheets 2, 3.)

This case illustrates several of the misconceptions about the selection process which permeate the dissenting opinion.

First, there is the erroneous reliance upon the jacket comments of the committee member who first reviewed the file as indicative of the bases for the committee decision. The reviewer was Mrs. Zorn and her initial comment was:

> "Enthusiastic recommend."
>
> "Abundant community action projects—Admit TZ"

The word "Admit" is struck through and the next line is "Wait C."

Then the next comment, also in Mrs. Zorn's hand, is:

> "recommend varied sources—Congressman Meeds, etc. all positive and enthusiastic, local boy abundant community service, ACLU in this state, legislative committee on Indian Affairs in D.C.—active, apparently committed young man"
>
> "recommend accept."
>
> (Exh. 17, sheet 2.)

Actually, it appears that Mrs. Zorn's eventual recommendation and the committee decision on May 12, 1971, was to place applicant on the "C" waiting list and that a subsequent decision to admit from that list was made September 8, 1971. (St. 283, Exh. 17, sheets 2, 3, 7.)

Second, the statement "Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: 'Enthusiastic recommendation, Abundant community action projects'" is a debatable one. The academic indicators appeared on the face of the file jacket so there would be little reason to repeat them in written comments. The phrase on the file "enthusiastic recommend" apparently refers to the several letters of recommendation in the file. (Exh. 17, sheets 17, 18, 19, 20, 21.)

The applicant was in the high end of the range from which discretionary selections were made and these other factors such as recommendations and outside activities admittedly played a part in those cases. Yet, if anything, the decision to place on the "C" waiting list in the first instance shows the relatively minor weight attached by the committee to these factors whatever may have been Mrs. Zorn's inclinations. (St. 283-285, 360.)

Finally, the comparison between this applicant and Mr. DeFunis tend to support the reliability of the committee process in this area of numerous applicants with closely compacted academic indicators. This applicant had a 76.53 PFYA, strong recommendations and strong activities. He was on the "C" waiting list. Mr. DeFunis had a 76.23 PFYA, weaker recommendations and less outside involvement and was placed on the "E" waiting list.

The applicant declined the late offer of admission. (Exh. 17, sheets 2, 3.)

Exhibit 18

Chief Justice Hale's statements at 82 Wn.2d 11, 56 and 59, Jur. St. A-46 and A-48-49:

> She [Mrs. Zorn] recommended, however, against the admission of another student with a 3.9 junior-senior grade average because she did not think that his area of study, the field of finance, adequately significant. Finance, as she put it, was a program without rigor. She was apparently unaware of the rigorous nature of courses in accountancy, statistics, economics and banking as taught at the University of Washington.
>
> * * *

> Another applicant earned a remarkably high junior-senior GPA of 3.90 and scored 599 in the LSAT, but achieved a writing score of only 46. He was notified of his acceptance by letter September 14, 1971, by the dean of the law school. There is apparently very slight correlation in many cases among the GPA, the LSAT and the writing scores.

The facts:

LSAT 599 Writing Score 46 Jr.-Sr. GPA 3.90 PFYA 76.47 (St. 288, Exh. 18, sheets 2, 12, 15.)

The committee placed applicant on the "C" waiting list on May 12, 1971, and he was so advised by letter dated May 21, 1971. (Exh. 18, sheets 2, 6.)

He was admitted from the waiting list on September 13, 1971, and so advised by letter dated September 14, 1971. (Exh. 18, sheets 2, 3; St. 287.)

Chief Justice Hale refers to this applicant at two separate points in the dissenting opinion without disclosing that the two references are to the same person.

Also, the opinion does not mention the fact that the committee action was contrary to Mrs. Zorn's recommendation, which was to deny. Thus, Mrs. Zorn's comments were:

> "That 3.9 does not appear significant in light of courses taken—don't know UW Finance program but it does not appear to me that he took a program of any rigor." [The balance of the comments following were apparently made at the time of committee action.]
>
> "Waiting C"
>
> "I still go with above and think LSAT valid indicator."
>
> (Exh. 18, sheet 2.)

Mrs. Zorn's testimony was that she was not familiar with the finance program at the University, that being an English and History major, she was in ignorance as to the values of accounting courses, that under these circumstances she wished to bring the question to the attention of the faculty members of the committee who read the transcript and made a perhaps better informed judgment as to the rigor of the courses. (St. 285-287.)

Exhibit 19

Chief Justice Hale's statement at 82 Wn.2d 11, 59, Jur. St. A-49:

> An applicant with a GPA of 3.55 was notified of his acceptance by the law school by letter of May 21, 1971, from the associate dean after achieving an LSAT of 625 and a writing score of 61. For some reason or other, the admissions committee recommended against outright admission but that he be placed on the waiting list. Despite this, however, the applicant was categorically admitted.

The facts:

LSAT 625 Writing Score 61 Jr.-Sr. GPA 3.55 PFYA 76.36 (Exh. 19, sheets 2, 29, 30.)

The statement in the dissenting opinion as to this applicant is inexplicable. The committee decided on May 12, 1971, to place him on the waiting list and he was so advised by letter from Dean Hunt dated May 21, 1971. (Exh. 19, sheets 2, 6.) Actually no admission offer ever was thereafter made to him. In September when the Admissions Secretary sought to contact him by telephone to ascertain if he wished to be admitted from the waiting list, she reached his mother instead who advised that he had enrolled elsewhere and agreed that he be withdrawn from the waiting list. (Exh. 19, sheet 3.)

Exhibit 21

Chief Justice Hale's statement at 82 Wn.2d 11, 58, Jur. St. A-48:

> By letter of March 2, 1971, an applicant with a junior-senior grade point average of 2.89, an LSAT of 663 and a writing score of 58 was accepted. Other than pointing out that the applicant was a member of a minority, the admissions council was noncommital.

The facts:

Minority applicant LSAT 663 Writing Score 58 Jr.-Sr. GPA 2.89 PFYA 74.52 (Exh. 21, sheets 2, 11, 17.)

The applicant was admitted by the committee February 24,

1971, and so advised by letter dated March 2, 1971. (Exh. 21, sheets 2, 7.)

The dissenting opinion is directly in error in the statement that the admissions committee was "noncommital." The space for "accept" on the file jacket shows the date stamp of committee action—February 24, 1971—and there are comments on the jacket though none express a recommendation. (Exh. 21, sheet 2.) The applicant did not enter. (Exh. 21, sheets 3, 4.)

Exhibit 22

Chief Justice Hale's statement at 82 Wn.2d 11, 56, Jur. St. A-46:

> Testifying concerning one applicant whose junior-senior grade point average was only 2.89, a comparatively low grade, he [Mr. Hayes] acknowledged, that applicant's file cover contained the statement entered by a committee member, "We seem to have bungled this one pretty conclusively. He's got us." The committee, having mistakenly accepted that applicant, he said, did not rectify the error and the particular applicant remained admitted.

The facts:

The foregoing characterization of the circumstances is misleading based upon the facts as disclosed by documents in the file and by the testimony. (St. 395-396.)

The applicant had first applied for and been admitted to the class entering in September, 1968. He accepted, enrolled, and attended for a short time during the orientation period. Due to the escalation in the size and quality of the applicant pool in intervening years, he probably would not have been admitted in 1970 or 1971 except under the military readmission rule. On September 23, 1968, he saw Professor Andersen, then Associate Dean, to shift his enrollment to the Graduate School for graduate work in the English Department, pending anticipated induction into the military service. Dean Andersen approved the appropriate "Change of College" form.

Apparently, there was some difference in understanding between the applicant and Dean Andersen as to the operative reason for the applicant's withdrawal from the Law School at

that time. (St. 395.) Dean Andersen's contemporaneous memorandum to the file dated September 23, 1968, states:

> Mr. [Blank] was in today to have me sign a Change of College form. He has decided that he prefers to do graduate work in English to coming to Law School. Since apparently he had initially planned to come to Law School only until his acceptance in the graduate school was final, I do not think he qualifies for automatic readmission after the military service which, as a 1-A draft registrant, he may soon undergo. (Exh. 22, sheet 26.)

In 1970, anticipating possible early release from the Army, the applicant sought readmission to the Law School class entering in Autumn, 1970. In a letter written at that time, the applicant described the circumstances of his earlier withdrawal as follows:

> I was accepted into the School of Law at the University of Washington for the autumn term, 1968. Two days into orientation week, I was informed by my draft board that my appeal of my 1-A classification had been turned down, and that my induction was imminent. Realizing that I would not be able to complete a full year of law school before I was drafted, I withdrew from law school and entered the graduate school of the University of Washington, where I completed one quarter before I was drafted. (Exh. 22, sheet 15.)

Note the difference in interpretation by the two individuals as to the operative reason for withdrawal from the Law School and shift to the Graduate School in English in 1968.

The applicant was advised by the Admissions Secretary of the Law School, on March 27, 1970, that he could renew his application by bringing the file up to date but that he would be competing for a place in the entering class with all other applicants and that he was not entitled to automatic readmission. (Exh. 22, sheet 13.)

The applicant was unable to obtain early release but wished to secure admission in the class to enter in September, 1971. He wrote the Admissions Secretary as follows in a letter received April 20, 1970:

> Thank you for your recent communique, RE: readmission to law school, fall of 1970. Unfortunately, I will not be

> able to get an early release from the Army, therefore I plan to use the forms you enclosed for my fall of 1971 application. Your efforts were most appreciated.
>
> I would like to find out, for future reference, why I would not be able to be readmitted under the provisions of section 3, All students, *Readmission after withdrawal*. I feel I meet those qualifications. (Exhibit 22, sheet 12.)

Dean Andersen undertook to respond negatively to the inquiry in the second paragraph of the above quoted letter but upon reflection felt that he may not have made it clearly evident to the applicant in 1968 that the circumstances of the withdrawal as then understood by Dean Andersen would not entitle the applicant to later readmission under the military rule. He therefore concluded that the applicant equitably should be readmitted in 1970. A handwritten note in the file by Dean Andersen dated May 3, 1970, states:

> I have tried drafting a response to this but it just won't "write." I'm afraid I should have given him a letter in 1968 with my conclusions in it, which would have estopped him from making the claim he now makes. We have no legitimate way of establishing on our record that he didn't do what he did for the reasons he now states and, on those reasons he is entitled to readmission. Sorry.
>
> WRA
>
> (Exh. 22, sheet 11.)

By letter dated June 4, 1970, the applicant was advised by the Admissions Secretary that "After discussing your situation with Dean Andersen, I have determined that you are entitled to automatic readmission for Autumn Quarter, 1971." (Exh. 22, sheet 10.)

That decision was carried out and reaffirmed when the applicants for 1971 were considered during the review process. See the file note by the Admissions Secretary dated December 31, 1970, and the letter to the applicant from Dean Hunt dated March 2, 1971. (Exh. 22, sheets 9 and 7.)

Whatever may have been the tenor of Professor Crooks' comment on the file jacket (St. 301), it scarcely seems appropriate to criticize the Law School for having bent over back-

wards to treat the applicant fairly in a case of apparent misunderstanding as to the effect of the earlier withdrawal on the application of the military readmission rule. It clearly is not a case in which the admissions committee "mistakenly accepted that applicant" and then failed to "rectify the error" as Chief Justice Hale states.

Exhibit 24

Chief Justice Hale's statement at 82 Wn.2d 11, 57 and 58, Jur. St. A-46-47 and A-48:

> The committee, he [Mr. Hayes] said, was trying to achieve what he described as a class balance based on an estimated potential for getting through school. He said most of the files given him for review were those of minority students. Another applicant he recommended for admission had a junior-senior grade point average of only 2.63 with the notation, "Excellent recommendations, sound record. Divorced with five kids. Could make it if her personal situation could be worked out, lightened load possibility? Admit."
>
> * * *
>
> Another young woman, earlier alluded to, was admitted to the law school with a junior-senior grade point average of 2.63, an LSAT of 481, and a writing score of 55. The file shows that she was 35 years of age at the time of admission and would thus be 38 upon graduation, if indeed able to complete the program on schedule. The remarks entered by the admissions council in her file note that she was "Divorced with five kids. Could make it if her personal situation could be worked out." It added, "Excellent recommendations; sound record," and upon these conclusions recommended admission to the law school.

The facts:

Minority applicant LSAT 481 Writing Score 55 Jr.-Sr. GPA 2.63 PFYA 70.60 (Exh. 24, sheets 2, 35.)

The applicant graduated from California State College at Hayward. (Exh. 24, sheet 22.)

She was admitted May 25, 1971, by the committee conditional on satisfactory completion of the CLEO Institute conducted that year at the University of California at Davis. (Exh. 24, sheets 2, 14; St. 394.) She completed the CLEO program with very good evaluations of her performance (Exh. 24, sheets 10, 11.) and was admitted August 26, 1971. (Exh. 24, sheets 2, 4.)

As the opinion mentions, she was 35 years old, divorced, with five children. (Exh. 24, sheet 22.) She worked extensively while an undergraduate and was plagued by illnesses. For one year in upper division, she worked an eight hour shift, 11 p.m. to 7 a.m., as a nurse's aide. (Exh. 24, sheets 22, 27-29, 30.) She was strongly oriented toward service to the minority community. (Exh. 24, sheets 27-29, 30-31.)

The recommendation letters were very strong. (Exh. 24, sheets 24, 25, 26-29, 30-31.)

Given the objectives of a special minority admissions policy, based upon the complete file before the committee she was a good prospect. Considering her background and the handicaps confronting her, the applicant had displayed great initiative, self-discipline and capability in completing college.

Exhibit 25

Chief Justice Hale's statement at 82 Wn.2d 11, 58, Jur. St. A-48:

> Another applicant with a junior-senior GPA of 3.32, an LSAT of 759, and a writing score of 60 was admitted by letter of July 23, 1971, from the associate dean of the law school despite the admissions committee's remarks set forth in his file that his "recommendations are equivocal and his academic career unimpressive." The admissions council deemed unimpressive a 3.32 junior-senior average earned in chemistry, physics, analytical geometry, calculus and general physics laboratory. This particular applicant with the so-called unimpressive academic record had also earned 6 hours of A in advanced calculus, 6 hours of A in mechanics and an A in introduction to digital computers.

The facts:

LSAT 759 Writing Score 60 Jr.-Sr. GPA 3.32 PFYA 77.65 (Exh. 25, sheets 2, 20, 23.)

The committee placed applicant on the "B" waiting list on May 10, 1971, and he was so advised on May 21, 1971. (Exh. 25, sheets 2, 8.) He was admitted from the waiting list by the committee on July 21, 1971, and was so advised by letter dated July 23, 1971. (Exh. 25, sheets 2, 5.)

The full comments on the file, all apparently by Mrs. Zorn except the last paragraph which seems to be in other handwriting, and apparently written at different times are as follows:

"4/26

"Waiting List—B TZ"

"On reconsidering, the floating and unsuccessful attempts at law & physics & a fairly unconvincing personal statement put him below my other B's in spite of good numbers."

"His recommendations are equivocal and his academic career unimpressive."

"Not sure about interest already tried law and found uninteresting."

"Physics success limited."

(Exh. 25, sheet 2.)

Apart from everything else, the comments are in the range of fair inference from the file. The applicant had received an A.B. degree in History from Stanford in June, 1962, and then started law school at Stanford but dropped out toward the end of the first quarter. (Exh. 25, sheets 12, 14, 17.)

He then attended San Jose State for a semester in 1963 and the University of Washington from September, 1963, to December, 1968, receiving a Master of Science in Physics in March, 1969. (Exh. 25, sheets 12, 23.) He was admitted to the graduate program in Physics in March, 1966, having pursued a preparatory upper division program in Physics prior to that time. (Exh. 25, sheets 16, 28, 29.) Though his performance at the undergraduate level was good (Exh. 25,

sheets 16, 28, 29), his performance in the graduate program was weak, he was consistently on either academic warning or probation, and finally was asked to discontinue graduate studies in Physics after completing work for the Masters degree. (Exh. 25, sheets 16, 30.)

Mrs. Zorn fairly characterized the academic record and the recommendations. (Exh. 25, sheets 16, 23.)

Chief Justice Hale's recital of courses in which the applicant earned A's could have been matched by the following: "Applicant earned C's in 3 hours of Elementary Probability, 3 hours of Matrices, 5 hours of Quantitative Analysis, 3 hours of Topics in Applied Analysis, and 3 hours of Electricity and Magnetism." (Exh. 25, sheets 28, 29.)

Exhibit 26

Chief Justice Hale's statement at 82 Wn.2d 11, 58, Jur. St. A-48:

> An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475, was admitted by letter from the associate dean dated July 29, 1971, despite the remarks of the admissions committee that he be rejected.

The facts:

Minority applicant LSAT 475 Writing Score 24 Jr.-Sr. GPA 2.37 (Exh. 26, sheets 3, 11, 14, 15.)

The committee placed him on the waiting list on May 26, 1971, and he was advised of this action by letter dated May 28, 1971. (Exh. 26, sheets 3, 9.) He was admitted from the waiting list by the committee on July 21, 1971, and was so advised by letter dated July 23, 1971. (Exh. 26, sheets 3, 6.)

The applicant had applied the year before with an LSAT of 445 and had been rejected. (Exh. 38, sheets 27, 36 and 19.) He attended the CLEO Institute at the University of Washington in the early summer of 1970 and satisfactorily completed it. (Exh. 26, sheets 30 and 31.) He retook the LSAT in December, 1970, and received a score of 505 which was averaged with the earlier score to yield the 475 LSAT. (Exh. 26, sheets 14 and 15.)

The "remarks of the admissions committee that he [the ap-

plicant] be rejected" to which Chief Justice Hale refers are the following from the year before:

"4/26/70"

"He reports his LSAT to CLEO as 445, 28, 40."

"He applied to Northwestern and I think he might be better off there. Reject—G.C." (Exh. 26, sheet 2.)

Exhibit 38

Chief Justice Hale's statement at 82 Wn.2d 11, 57-58, Jur. St. A-47:

> One cannot discern from the files whether a heightened community or campus activity, or whatever, constituted the determining factor for admission. One young woman with a junior-senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council.

The facts:

LSAT 626 Writing Score 66 (Exh. 38, sheets 2, 20.)

The GPA and the PFYA were the subject of recomputation. It was first computed as 74.69 (Exh. 38, sheet 19.) based on an apparent 3.0 average for 8 semester hours at Portland State in 1970 and four semester hours at Reed in 1970. Two prior years with full loads had been at Reed, *i.e.*, 1968-69 with 28 semester hours and 1969-70 with 36.0 semester hours. (Exh. 38, sheet 20.) The Portland State work was in summer session and the four hours work at Reed would have been just the beginning of the 1970-71 academic year work at Reed, aggregating only 12 hours in total. Hence, the GPA was recomputed employing the small amount of third year work at Reed, the summer session work at Portland State and the 36 hours of work in the applicant's second year at Reed. This yielded a GPA of 3.36 and a PFYA of 75.96. (Exh. 38, sheet 18 and sheet 2.)

The applicant was placed on the "C" waiting list by the committee on May 13, 1971, and was so advised by letter dated May 21, 1971. (Exh. 38, sheets 2, 8.) She was admitted from the waiting list on September 13, 1971, and was so ad-

vised by letter dated September 14, 1971. (Exh. 38, sheets 2, 3.)

The dissenting opinion erroneously states the LSAT score as 702. In fact it was 626.

CONCLUSION

Chief Justice Hale's distorted perception of the results of the admission selection process is perhaps best exemplified by the following statement from his dissenting opinion:

> Of the approximately 150 students actually enrolled in the class for which petitioner DeFunis made his application, only some 42 admission files were placed in evidence. But an inspection of these files, in my judgment, fails to show any consistent policy on admissions at which a prelaw student could aim his career. If he is intelligent, works hard, and achieves high grades, his place in the law school class may be preempted by someone with lesser grades but who is engaged in what is described as "community activities," or is otherwise described as a student activist. Or, if he is engaged in community activities and still attains high grades through diligence and intelligence and long hours at the books, his position may be taken in the entering class by one who has neither engaged in "community activity" nor achieved high grades but, nevertheless, has made a high LSAT score. Or, even if he studied hard, is intelligent, and placed high in grades, LSAT and PFYA, and engaged in what are called community activities, his place might still be awarded to a minority student who has done none of these. All of these inequities are, I fear, bound to foster a spirit of anti-intellectualism in the heart of what should be an intellectual center. (82 Wn.2d 11, 59-60, Jur. St. A-49.)

On the record, this interpretation is unjustified. It took a combination of high grades, high LSAT scores and other evidences of great academic potential to secure admission. The extra-curricular and community activities and work history of applicants played a role in the selection decisions only as among applicants relatively closely placed in the marginal range. Moreover, whatever displacement of applicants that occurred by reason of the special minority admissions program also was in that range and not in the area of the most highly qualified applicants.

APPENDIX B

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Appellants-Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Appellees-Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES-RESPONDENTS' MEMORANDUM ON THE QUESTION OF MOOTNESS

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October 31, 1973

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IN THE

Supreme Court of the United States

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES-RESPONDENTS' MEMORANDUM ON THE QUESTION OF MOOTNESS

This memorandum is submitted on behalf of the appellee-respondents in response to the request of the Court received in this office on October 25, 1973, to express the views of counsel on the possibility of mootness of this case.

STATEMENT OF FACTS RELEVANT TO THE QUESTION OF MOOTNESS*

Appellants-Petitioners (hereafter referred to as DeFunis)

* Due to time restrictions, references are not made to the transcript of record on appeal but counsel believes and asserts that the record will support the statement of facts set forth except where recent events are referred to or as otherwise indicated in the text.

commenced an action in the King County Superior Court on August 18, 1971, naming the appellees-respondents (hereafter referred to as the university), in which DeFunis asked the court to order the university to admit and enroll him in the university's law school for the fall of 1971. Following preliminary motions and limited discovery, the case was tried by Judge Lloyd Shorett of that court on September 14, 1971. A preliminary injunction had been issued prior to the trial, holding a place open which could be filled by Mr. DeFunis should the relief he was seeking be granted. The trial of the matter took approximately three days and the opinion of the court was rendered on the following Wednesday, September 22, 1971. Pursuant to the opinion of the court, Mr. DeFunis was enrolled in the law school class commencing the fall of 1971. Classes had just commenced the preceding Monday, September 20, 1971. The formal entry of judgment and findings of fact and conclusions of law by Judge Shorett were entered on October 18, 1971. On October 21, 1971, the university filed and served its notice of appeal. The matter was appealed directly to the Supreme Court of the State of Washington since it involved "fundamental and urgent issues of broad public import requiring prompt and ultimate determination." Washington Supreme Court Rules on Appeal I-14.

There was no delay in the appeal process and the matter was argued before the Washington Supreme Court on May 15, 1972. The opinion of the Washington Supreme Court was filed on March 8, 1973, and the attorneys for DeFunis promptly filed their petition for rehearing which was denied without argument by that court. Mr. DeFunis' appeal to this Court was filed shortly thereafter. The only delay here was occasioned by a short extension of time to the university to file its motion for affirmance or dismissal, occassioned by the *amicus* brief in support of appellants consented to by the parties.

DeFunis has continued his progress in the law school working toward his Juris Doctor degree and is presently in the first quarter of his last year. The law school program at the university is a three-year program which could in exceptional cases be accelerated by attendance during summer quarters. Mr. DeFunis has not attended during the summer quarters and if his present progress were to continue as it has in the past, he would complete his course work and presumably be awarded his Juris Doctor degree at the end of the spring quarter on June

14, 1974. Registration for his final quarter at the University of Washington will occur between the period of February 20, 1974, and March 1, 1974. These facts are not contained in the record but are taken from the University of Washington's published catalog for the academic year 1973/74.

During the oral argument of this matter before the Washington State Supreme Court, one of the justices of that court inquired of counsel for the university whether or not he believed the case was then moot (May 15, 1972). While that oral argument was not transcribed and is not a part of the record before this Court, the answer to that inquiry by the university's counsel was substantially as follows:

> "I do not believe the matter is moot. Mr. DeFunis remains in law school because of an order of the superior court which is now on appeal to this court and not by reason of the exercise of the discretion vested in the board of regents of the University of Washington and, through it, in the law school of the University of Washington. If that discretion is restored to the university and its law school, as we believe this court should do by reversing the lower court, the university would then consider Mr. DeFunis' application for enrollment upon the merits as they then stand, which means upon his probability at the time of consideration of successfully completing his law school education at the university."

The above response is the short answer to this Court's question concerning mootness now, since all the facts operative on May 15, 1972, are operative now (October 31, 1973).

If the decision of the Washington State Supreme Court is permitted to stand, Mr. DeFunis would have to take some appropriate action to request continued admission for the remainder of his law school education, and some discretionary action by the university on such request would have to be taken. Counsel is advised by the Dean of the law school (and we both believe that this Court should be advised) that even if discretion with respect to the continuance of Mr. DeFunis' admission to the law school is returned to the university by final termination of this litigation prior to his registration for a final quarter of study, it would be most unlikely that the university would make a decision preventing him from completing the balance of his course of study for the J.D. degree. Counsel

is further advised by the Dean of the law school (and we believe this Court should be advised) that if Mr. DeFunis registers for the spring quarter under the existing order of this court during the registration period from February 20, 1974, to March 1, 1974, that registration would not be canceled unilaterally by the university regardless of the outcome of this litigation.

POSITION OF THE UNIVERSITY

The university urges dismissal of this appeal or, in the alternative, affirmance of the judgment below and denial of certiorari for the reasons set forth in its Motion of Dismissal of Appeal or, in the Alternative, Affirmance of the Judgment Below and Statement in Opposition to Certiorari filed with this Court. In that motion, the university did not urge the dismissal of this appeal on the grounds of mootness, and it does not now urge the dismissal of this appeal on the grounds of mootness for the reason that the matter is not moot.

ARGUMENT

1. *The Case is not Moot*

We understand the doctrine of mootness to be based on Article III, § 2, U. S. Constitution, which sets forth the jurisdiction of this Court and other federal courts and confines that jurisdiction to certain cases and controversies. *Liner v. Jafco, Inc.* 375 U.S. 301, 306 n.3, 11 L. Ed. 2d 347, 351, 84 S. Ct. 391 (1964). This Court has defined such a "case" or "controversy" as one which

> "[M]ust be definite and concrete, touching the legal relations of parties having adverse legal interests .... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241, 81 L. Ed. 617, 621, 57 S. Ct. 461 (1937).

The constitutional doctrine of mootness is summarized in this Court's opinion in *North Carolina v. Rice,* 404 U.S. 244, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971).

This case is not moot because if the appeal is dismissed or the judgment below is affirmed, as the university has urged in its motion, Mr. DeFunis will be required to re-apply for admission to complete his law school education at the University of Washington law school, and the University of Washington will have to exercise its lawful discreton in acting on that request. This will be true at least until February 20, 1974. Thus, the decision of this Court can affect the rights of the litigants, there remains a concrete controversy that has been presented in an adversary context, and the action is based on real not hypothetical facts. *Sibron v. State of New York*, 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968). This Court, while not explicitly basing its holding thereon, stated as follows:

> "None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case. There is nothing abstract, feigned, or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the 'impact of actuality' to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act." *Sibron*, 88 S. Ct. at 1900.

The recent comment in 84 Harv. L. Rev. 1972 explores the Court's statement in some depth and concludes that such an argument is essentially sound.

2. *This Case Falls within the Exceptions to the Mootness Doctrine Developed by this Court*

This Court recently discussed exceptions to the mootness doctrine in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) where, after discussing the general doctrine, it stated:

> "But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termina-

> tion makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'" *Wade*, 93 S. Ct. at 713.

While the facts in *Wade* are different from those in this case, and it certainly takes longer to complete a law school education than it does to complete a pregnancy, this case illustrates the possibility that it may well take longer to commence a case in a state trial court and follow it through to final resolution by review and disposition by this Court than it takes to complete a three-year law school education.

While it is possible that the important constitutional issues raised in this appeal can be resolved before the case becomes moot, particularly if the plaintiff were unsuccessful at the initial stage of the proceedings, it is improbable. Such a plaintiff, in all probability, would seek admission elsewhere, or decide on a different career, rather than wait out the long and expensive appellate process which would delay his legal education for at least two years.

There can be do doubt that the case raises important constitutional questions and that the actions complained of here will be repeated, though admittedly not to Mr. DeFunis. Thus, if the Court were to adhere to a narrow construction of the exceptions in *Wade*, it would follow that the mootness exception would not apply in this case if, in fact, it were moot. In *Moore v. Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 L. Ed. 2d 1 (1969), this Court ruled on the constitutionality of certain election procedures in Illinois where there is need for resolution of a "continuing controversy" even though the matter had become moot as to the particular parties involved, citing *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911) which this Court also cited in *Wade*. But, the *per curiam* opinion in *Hall v. Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 90 S. Ct. 200 (1969) arguably limits the *Moore* holding to those cases capable of repetition to the *same* parties and evading review. Mr. Justice Brennan and

Mr. Justice Marshall, dissenting, expressed their conviction that the Court had too narrowly construed the opinion in *Moore*. We note, however, that in its recent unanimous decision in *Brown v. Chote*, 93 S. Ct. 1732, — L. Ed. 2d —, — U.S. — (1973), the exception is stated in the more general term that "the question raised is one 'capable of repetition, yet evading review.' Consequently the case is not moot." 93 S. Ct. at 1736, n.4.

We believe the significance of the issues in this case would justify adherence to the broader interpretations of the exception to the mootness doctrine should the Court be convinced that the case is, in fact, moot.

CONCLUSION

The university respectfully urges the Court to grant its Motion for Affirmance or Dismissal for the reasons set forth in its motion before this Court, but not on the grounds of mootness since the case is not, in fact, moot and, if it were, it would fall within the exception to the doctrine expressed in *Roe v. Wade, supra.*

Respectfully submitted,
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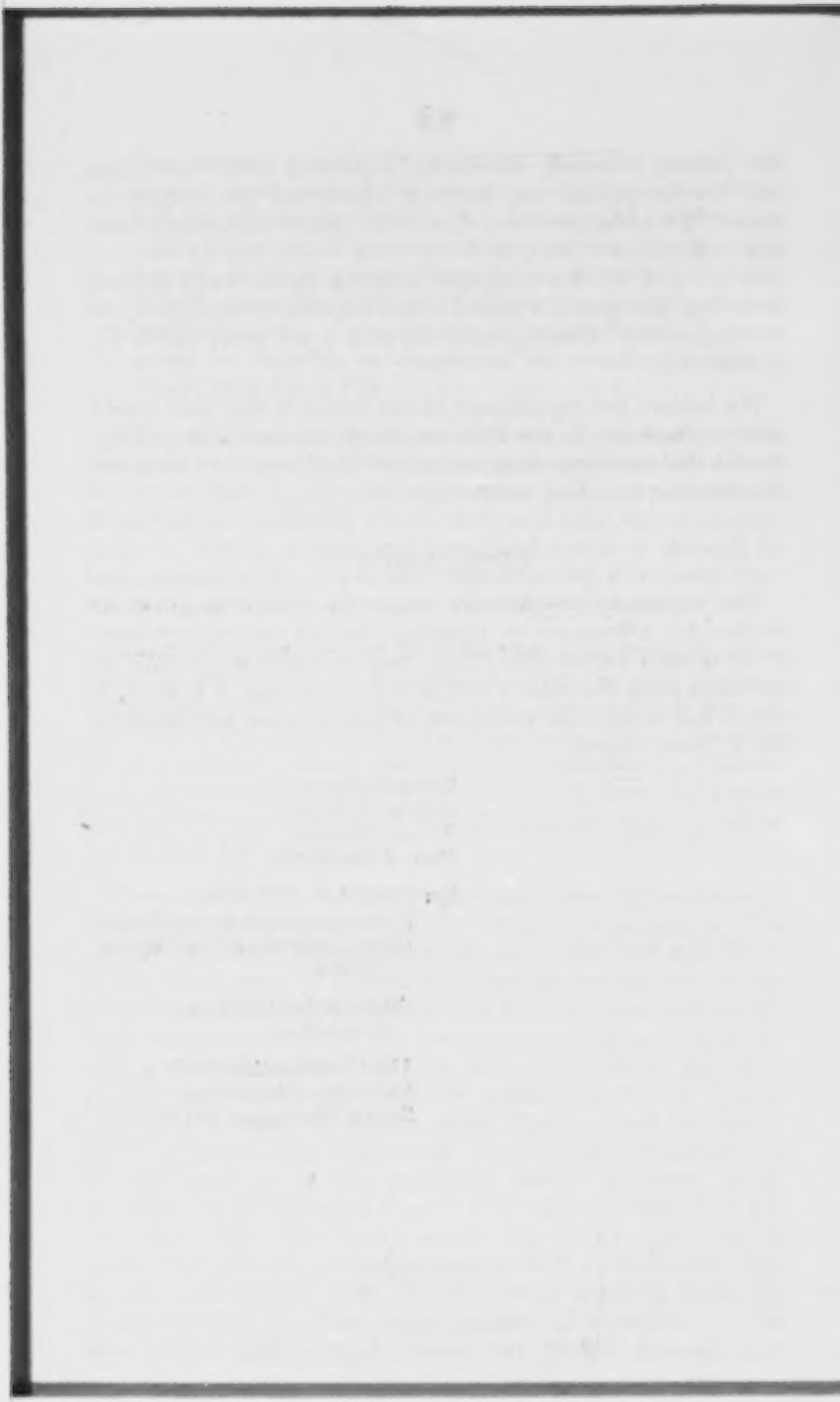

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IN THE
Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DeFUNIS and BETTY DeFUNIS, his wife;
MARCO DeFUNIS, JR. and LUCIA DeFUNIS, his wife,
Plaintiffs-Appellants,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK C. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,

Defendants-Respondents.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

PETITIONER'S MEMORANDUM ON MOOTNESS

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IN THE
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October Term, 1973

MARCO DeFUNIS and BETTY DeFUNIS, his wife; MARCO DeFUNIS, JR. and LUCIA DeFUNIS, his wife,

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Defendants-Respondents

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

NO. 73-235

PETITIONER'S MEMORANDUM ON MOOTNESS

Petitioner, Marco DeFunis, Jr., is presently in the University of Washington Law School only by reason of an outstanding order of the Superior Court of the State of Washington which has been kept in effect by the stay entered herein by Mr. Justice Douglas.

Attached hereto as Appendix I* is a correct copy of the Judgment of the Superior Court by which he is now in school.

If the Petition should be denied, the injunction and stay would cease to be effective and there is nothing that would prevent the University from terminating his enrollment.

* [Omitted from this Appendix B.]

This is not an empty fear. When the state court decision was rendered, Mr. DeFunis was requested by the University to submit a request, to be acted upon by the faculty, for permission to remain in law school. It was only the stay issued by this court that relieved him of the necessity of submitting to this procedure.

The law school course takes three years for completion.

While this case has been pending Mr. DeFunis has completed the first two years of the course. The third year has just commenced and will not be completed until June of 1974.

We note that on Page 7 of Appellees' Motion to Dismiss or Affirm, the note at the bottom of the page makes the statement that:

> "Assuming his present rate of progress he will complete his third year and be awarded his JD degree at the end of the 1973/74 academic year regardless of the outcome of this appeal."

Appellant has no assurance that he will be permitted to finish the present academic year regardless of the outcome of this appeal. If the present application is denied there will be nothing to prevent the University from reverting to its original position that he is not entitled to be in law school.

Appellant knows no basis for the statement in the footnote in respondents' brief that Mr. DeFunis will be allowed to remain in school until the end of the 1973/74 academic year and be awarded his JD degree regardless of the outcome of this appeal.

A mere statement by a party that he will not engage in the conduct enjoined is not basis for making a case moot. In *United States v. Phosphate Export Association*, 393 U.S. 199, 21 L. Ed. 2d 344, 89 S. Ct. 361, this court rejected such a contention, saying:

> "But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes. *United States v. W. T. Grant Co.*, 345 U.S., at 633, 97 L. Ed. at 1309, 73 S. Ct. 894."

So in this case we have only the statement of counsel that DeFunis will graduate at the end of the academic year. If the court should deny this petition and the University should terminate Mr. DeFunis' enrollment, Mr. DeFunis would have no recourse. A footnote in a brief is not enough to bind the University to assure DeFunis he will be permitted to continue in school. *The enrollment is now in effect only because of the outstanding injunction and stay.*

Further, DeFunis should be entitled to graduate as a legally enrolled student and not have the stigma throughout his professional career of having attained graduation only because of the delays of litigation.

This court has recognized an exception to the mootness rule in cases where controversies present what are essentially recurring issues of public interest and where there is no assurance that the occasion for a restraining order will not recur.

These rulings were summarized by the 8th Circuit Court of Appeals in *Ihrke v. Northern States Power Company* (Ca. 8th 1972), 459 F.2d 556, 15 F.R.S. 2d 1571, where the court said:

> "However, federal courts have recognized an exception to the mootness doctrine where recurring questions of public interest are involved. In *Women Strike for Peace v. Hickel*, 137 U.S. App.D.C. 29, 420 F.2d 597, 604 (1969) (2-1), the federal court
>
> > "'*When controversies present what are essentially recurring issues of public interest they are not mooted because the most recent particular occasion for consideration of the issue has come and gone.*'
>
> *See also* United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L. Ed. 1303 (1953); Allen v. Hickel, 138 U.S.App.D.C. 31, 424 F.2d 944, 950 (1970); Friend v. United States, 128 U.S.App.D.C. 323 338 F.2d 579, 581 (1967) and cases cited therein at n.1.
>
> "In *Boggess v. Berry Corporation*, 233 F.2d 389, 391, 16 Alaska 256 (9th Cir. 1956) the Ninth Circuit held:
>
> > "'Where, however, interest of a public character are involved under conditions that may immediately be

repeated, thus giving the litigation a continuing character . . ., *the mere fact that the particular subject matter of the instant cause has expired does not render the case moot.*'

"In *Dyer v. Securities and Exchange Commission*, 266 F.2d 33, 47 (8th Cir.), cert. denied, 361 U.S. 835, 80 S.Ct. 86, 4 L.Ed.2d 75 (1959), this Court recognized the 'public interest' exception to the mootness doctrine. In that case, this Court said:

"'In still wider horizon, there also is a recognized right of judicial discretion, in the public interest, to deal with the validity or propriety of administrative regulations and actions, where they have justiciably been brought into court, even though they may perhaps have ceased thereafter to have a direct significance in the particular situation. This does not mean that a court is required or has the right to engage in a decision of this character in every such situation; but it is judicially entitled to do so where it appears that some general benefit may public-wise, or in relation to the possibility of further similar litigation, come from having it established whether the administrative agency has acted within or without its authority.'"
[Emphasis added.]

The foregoing case, while a decision of the Court of Appeals, resulted in this court retaining jurisdiction and making a decision. 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed.2d 72.

To the same effect see *Dunn v. Blumstein* (1972), 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274; and *Moore v. Ogilvie* (1969), 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed. 2d 1; and *Southern Pacific Terminal Company v. Interstate Commerce Commission* (1911), 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310.

This case falls within the ruling of the cases just cited. In addition to being a matter of wide public interest, *this case has not become moot at this time and involves a current and viable issue, namely, the right of Mr. DeFunis to continue his enrollment in the University of Washington Law School and to graduate as a legally enrolled student.*

This right needs to be protected. He should not be subjected to chancing the results of a decision by the authorities of the

University to terminate his enrollment once the stay is lifted.

This is one of those cases where the mootness doctrine does not apply because the condition sought to be protected is still very much present, namely, his continued enrollment.

This case is like the situations discussed in Moore F.P.2d V.6a, Page 57-133, ¶57.13, where the text states:

> "The performance of the particular act sought to be enjoined may moot the injuction issue, but where there is a likelihood that the act complained of will be repeated, the issues remain justiciable, and a declaratory judgment may be rendered to define the rights and obligations of the parties. This is peculiarly true when the behavior underlying the action is such that in the nature of things the immediate controversy will be terminated before the underlying rights can be heard on appeal. In such cases a strict adherence to the requirement of a present controversy would leave the plaintiff always suspended between prematurity and mootness. *Roe v. Wade* was such a case. The issue involved was the constitutionality of a state statute prohibiting abortions except under very limited circumstances. If the plaintiff were to bring the action before she was pregnant, she would risk dismissal for want of standing. If she waited until she was pregnant, she would have a maximum of 266 days in which to litigate before the case was moot. Indeed, under the doctrine ultimately announced, 90 days. Under these circumstances the Supreme Court held that the mootness doctrine would not be applied to require dismissal."

A case involving a student's right to attend a university may be analogous to the situation presented in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 referred to in the above quotation, where the process of litigation might extend beyond the term of his course and no resolution of the issues by this court could ever take place if the mootness doctrine were applied in all of its strictness.

However, this is not a case where we must rely upon the doctrine of *Roe v. Wade* because ***nothing has occurred to make this case moot.***

There is a real issue involving rights which DeFunis is entitled to call upon the courts to protect. This case is not moot.

Respectfully submitted.

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